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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 597

MISSISSIPPI POWER COMPANY and MISSISSIPPI POWER & LIGHT COMPANY, *Petitioners,*

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, *Respondent*

NO. 45,065 IN THE SUPREME COURT OF MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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I

Introductory

Come now Mississippi Power Company and Mississippi Power & Light Company, Petitioners, and pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi made and entered in the above entitled cause on June 10, 1968, and the order of the Supreme Court of the State of Mississippi denying petitions for rehearing, entered on July 8, 1968, wherein the Supreme Court of Mississippi affirmed and reinstated an order of the Mississippi Public Service Commission (sometimes hereinafter referred to as "Commission") granting to the Respondent an amended certif-

icate of public convenience and necessity under the provisions of Chapter 372, Laws of Mississippi of 1956 (being Sections 7716-01 through 7716-38, Mississippi Code of 1942 Recompiled), for the construction and operation of a steam electric generating plant and transmission system to be located in the southeastern portion of the State of Mississippi. The Supreme Court of Mississippi thereby reversed a judgment of the Chancery Court of Hinds County, Mississippi, First Judicial District, an intermediate appellate court with respect to Commission orders, which had reversed such Commission order.

II

Opinions and Judgments Rendered Below

A. A copy of the order of the Commission dated January 5, 1967 (to which is exhibited the Commission's earlier order dated March 7, 1963) is appended hereto as Appendix No. 1.

B. Copy of the final decree of the Chancery Court of Hinds County, Mississippi, First Judicial District (dated December 22, 1967) is appended hereto as Appendix No. 2.

C. Copies of the opinion and judgment of the Supreme Court of Mississippii rendered on June 10, 1968 are appended hereto as Appendices Nos. 3 and 4. The opinion is now reported in 211 So. (2d) 827.

D. A copy of the order of the Supreme Court of Mississippi, dated July 8, 1968, denying petition for rehearing is appended hereto as Appendix No. 5.

III

Grounds on Which Jurisdiction of this Court is Invoked

A. The judgment sought to be reviewed was rendered by the Supreme Court of Mississippi on June 10, 1968. Such

judgment affirmed and reinstated an order of the Commission dated January 4, 1967.

B. Petition for rehearing was denied by the Supreme Court of Mississippi on July 8, 1968.

C. Jurisdiction is believed to be conferred on this Court by Title 28, U.S.C.A., Section 1257 (3).

IV

Question Presented for Review

Whether the Mississippi Public Service Commission has deprived Petitioners of their property without due process of law and has denied Petitioners the equal protection of the laws by said Commission's refusal to receive and consider evidence offered by Petitioners, thereby denying to Petitioners a full and fair hearing in proceedings before said Commission incident to the issuance of its order of January 4, 1967, Appendix No. 1 hereto, all in violation of the Fourteenth Amendment to the Constitution of the United States.

V

Constitutional Provisions and Statutes Involved

A. Amendment XIV, Section 1, to the Constitution of the United States, is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. Chapter 372, Laws of Mississippi of 1956 (appearing as Sections 7716-01 through 7716-38, inclusive, of the Mississippi Code of 1942, Recompiled), and particularly Sections 7716-01, 7716-04, 7716-05, 7716-14, 7716-23, 7716-24, 7716-25, and 7716-26 thereof. Because of the length of the referenced statute sections, these sections are set forth as Appendix No. 6 hereto.

VI

Statement of the Case

In 1963, the Commission issued, after extended hearings, an order pursuant to Section 7716-05(c), Mississippi Code of 1942, Recompiled, granting to Respondent a certificate of public convenience and necessity authorizing it to construct and operate a steam electric generating station (consisting of two 22,500 kilowatt steam turbines and one 20,500 kilowatt gas turbine) and 390 miles of 69 KV transmission lines for the purpose of supplying certain electric requirements of four R.E.A. financed electric distributing co-operatives in southeast Mississippi, such requirements being then, and now, supplied by Petitioners, who are investor-owned public utilities engaged in the generation, transmission, and distribution of electric power in Mississippi. The 1963 order was appealed by Petitioners, and was, on February 14, 1966 affirmed by the Supreme Court of Mississippi in Mississippi Power Company, et al, v. South Mississippi Electric Power Association, 254 Miss. 754; 183 So. (2d) 163. A copy of that opinion is appended hereto as Appendix No. 7. A petition to this Court for certiorari with respect to that decision was denied October 10, 1966, 385 U.S. 823, 17 L. Ed. (2d) 60.

Meanwhile, on July 20, 1965, while the appeal of the 1963 order was pending, Respondent filed with the Commission a petition to amend the 1963 certificate to authorize the construction and operation of a different system in lieu of that specified in the 1963 certificate. No

construction has been undertaken pursuant to the original certificate. The 1965 petition sought authority to construct and operate two generating plants (one a 150,000 kilowatt plant consisting of three 50,000 kilowatt steam turbines, and the other at a remote location consisting of one 14,000 kilowatt gas turbine) and 800 miles of transmission line (the original certificate authorized 390 miles) some of which were to be at 161 KV instead of 69 KV. Petitioners thereupon suggested to the Supreme Court of Mississippi that the issue of original 1963 certificate had become moot. The Supreme Court of Mississippi, in refusing such suggestion, said, concerning the new petition to amend:

> "The issue raised by the plea in bar was not before the commission at the time of the hearing. Without deciding that the same is properly before us, we hold that the conditions existing in 1965 were not necessarily the conditions existing in 1960, the year in which the forecasts were made as to the electrical needs, and for this reason the plea in bar should be overruled and this appeal restricted to the economic conditions existing at the time the case was before the commission. *The issues raised by the amended application are issues to be determined by the commission when properly presented to it.*" (Emphasis supplied)

Hearings by the Commission on the petition of Respondent to amend the 1963 certificate were held in September and October, 1966. To the petition to amend, Petitioners had filed separate protests and objections denying that public convenience and necessity existed for that sought by the petition to amend, alleging that Petitioners were then providing, and were ready, willing, able, and had offered to continue to provide, to the distributing co-operatives all their electric requirements at rates greatly below those proposed by Respondent; that service from Respond-

ent (whose system would be isolated) would be inferior to that from Petitioners (whose systems are parts of large interconnected resources); that unnecessary and uneconomic duplication of facilities would result from the project; that existing certificate rights of Petitioners would be violated and their constitutional rights thereby impaired; and that the public interest would be adversely affected by the governmentally subsidized interest rate of 2% at which Respondent would finance the project. Rates at which Respondent would serve the purchasing co-operatives are exempt from regulation by both the Commission (See Sec. 7716-01-E, Mississippi Code of 1942, Recompiled, Appendix 6 hereto), and the Federal Power Commission (Respondent's operations being wholly intrastate), while service from Petitioners (being interstate) is regulated by the Federal Power Commission under the Federal Power Act. Rates charged by the purchasing co-operatives to their members are not subject to regulation by the Commission except in the case of the relatively few members who are served inside corporate limits of municipalities. (See Sec. 7716-04, Mississippi Code of 1942, Recompiled, Appendix 7 hereto.)

At the hearing, Respondent was permitted to introduce, and the Commission received, all the evidence it offered, including testimony with respect to the cost of the project and economics of operation. (Vol. VII, p. 519; Vol. X, pp. 814-19; Vol. XI, pp. 955-966; Vol. XI, p. 994; Vol. XI, pp. 1001-1019).

The Commission refused to receive in evidence or to consider evidence offered by Petitioners, the substance of which is in the record by way of proffer and tendered exhibits as follows:

1. That the service which Respondent sought to render to the purchasing co-operatives is now being rendered

to these distributing co-operatives by the Petitioners. (Vol. XV, pp. 1477-79; Exhibit PA-85, Vol. XV, pp. 1481-1484; Vol. XIV, pp. 1275-1350, Exhibits PA-62 through PA-67.)

2. That the costs to the distributing co-operatives of purchasing electric service from Respondent will be far greater than the cost of continued purchase of this service from Petitioners. (Vol. XV, pp. 1496-99; Vol. XV, pp. 1510-18, Exhibit PA-89; Vol. XV, p. 378, Exhibit PA-73.)
3. Evidence showing the size and capabilities of Petitioners' generating plants and transmission systems, including additions thereto made after the hearing of the original petition in 1962, the interconnections of Petitioners' electric systems with other systems, all relevant and necessary to show the ability of the Petitioners to supply the service which Respondent seeks to replace. (Vol. XV, pp. 1526-35; Vol. XVI, pp. 1556-60; Exhibits PA-93 and PA-94, Vol. XVI, pp. 1565-67, and p. 1572; Vol. XVI, pp. 1545-46; Vol. XVI, pp. 1594-5; Vol. XIV, pp. 1352-1368, and Exhibits PA-68 through PA-70.)
4. Evidence offered by Petitioners that they are ready, willing, able and have offered to continue to supply the electric requirements of the distributing co-operatives. (Vol. XV, pp. 1518-19; Vol. XVI, pp. 1542-3; Vol. XIV, pp. 1275-1350.)
5. Evidence offered by Petitioners that the estimates of probable operating expense offered by Respondent and received by the Commission were not accurate. (Vol. XVI, p. 1653; Vol. XVI, pp. 1657 et seq; Vol. XVI, pp. 1661-5.)
6. Evidence offered by Petitioner of the loss to State and Federal Treasuries from the proposed project because of the tax-exempt status of Respondent and

the federally subsidized interest rate of 2% under which R.E.A. would finance the project. (Vol. XVII, pp. 1697-8; Vol. XVII, pp. 1700-05.)

7. Refusal of the Commission to permit Petitioners to cross-examine Respondents' witnesses with respect to the validity of load forecasts, (Vol. VI, pp. 422-42); and with respect to service points presently served by Petitioners. (Vol. IX, pp. 742-5.)

During the hearing, Petitioners asserted their right to a full hearing, protested the above rulings of the Commission, and further asserted in the record that such rulings constituted a denial of their rights under the Fourteenth Amendment to the Federal Constitution. (Vol. V, p. 310-11; Vol. VI, p. 355; Vol. IX, p. 744-5, Vol. XVI, p. 1626.)

The Commission issued its order on January 4, 1967, granting Respondent an amended certificate in accordance with its petition therefor in all respects. Petitioners filed with the State Commission, in accordance with the statute, a petition for rehearing in which, among other contentions, they asserted that the State Commission, by its evidentiary rulings, had deprived Petitioners of their constitutional rights under the Fourteenth Amendment to the Federal Constitution and had denied to them their constitutional rights to a full and fair hearing. (Vol. XVII, pp. 1801-13 and XVII, pp. 1814-26.) By refusal to act within the period prescribed by statute, the Commission denied the petition for rehearing. (See Sec. 7716-25, Mississippi Code of 1942, Recompiled, Appendix 6 hereto.) Thereupon, Petitioners appealed to the Chancery Court of Hinds County, Mississippi, First Judicial District, the intermediate appellate court for appeals from Commission orders. In their assignments of error filed in such court, the Petitioners again asserted that the Commission evidentiary rulings at the hearing deprived them of a fair and full hearing in violation of their rights under

the Fourteenth Amendment. (Vol. XVIII, pp. 1882-91, and Vol. XVIII, pp. 1892-98.) The Chancery Court rendered its opinion that the Commission's order should be reversed, and on December 22, 1967 entered its final decree reversing the Commission's order. (See Appendix No. 2 hereto.) Respondent thereupon appealed to the Supreme Court of Mississippi, which, on June 10, 1968, renderd its opinion reserving the decree of the Chancery Court and reinstating the Commission's order of January 4, 1967. Within the prescribed time, Petitioners filed in such court petitions for rehearing in which they again asserted the deprivation of their constitutional rights by the Commission to a fair hearing. The Supreme Court of Mississippi, on July 8, 1968, denied the petitions without opinion and without responding to the constitutional assertions advanced by Petitioners in their petitions for rehearing.

It is the position of Petitioners that the actions of the Commission and the Supreme Court of Mississippi have denied Petitioners the equal protection of the laws, and have deprived Petitioners of substantial and valuable rights, which have been timely and repeatedly asserted throughout the entire proceeding, in violation of the Fourteenth Amendment, and that such deprivation presents to this Court a substantial constitutional question which this Court should review by granting the Writ of Certiorari herein sought.

VII

Reason Why Writ of Certiorari Should be Granted

The Fourteenth Amendment requires that administrative agencies of a state must, in order to comply therewith, afford to every person who is properly before such agency in any proceeding a full, fair and complete hearing with respect to the matter under consideration. Failure of an

administrative agency so to do is a denial of constitutional rights guaranteed by the Constitution. Petitioners were denied before the Commission such a hearing. This Court has frequently stated what is necessary to meet the constitutional requirements of a fair hearing, both with respect to Federal administrative agencies under the Fifth Amendment and with respect to state administrative agencies under the Fourteenth Amendment. The requirements are identical under each.

The Commission heard and considered evidence offered by Respondent tending to establish the alleged fact that public convenience and necessity required the facilities authorized by the amended certificate. The Commission refused to hear or consider Petitioners' evidence tending to establish that public convenience and necessity neither required nor permitted construction of such facilities. Petitioners were thereby denied the equal protection of the laws. Equal protection of the laws implies that all litigants similarly situated may apply to the Courts for relief under like conditions and without discrimination. *Republic Pictures Corp.* v. *Kappler,* 151 F. 2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040; *Swick* v. *Glenn L. Martin Co.,* 68 F. Supp. 863, affirmed 160 F. 2d 483, certiorari denied 68 S.Ct. 85, 332 U.S. 772, 92 L.Ed. 357.

In *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431, the Court said:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. . . . Such authority, however beneficiently exercised in one case,

could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of Power." (57 L.Ed. p. 433)

* * * * *

"All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." (57 L.Ed. p. 434)

In *Republic National Bank* v. *Crippen,* U.S.C.A. 5th, 224 F. 2d 565, the Court said:

"The right to be heard on their claims was a constitutional right and the denial of that right to them was the denial of due process which is never harmless error." (224 F. 2d p. 566)

In *L. B. Wilson, Inc.* v. *Federal Communications Commission,* U.S.C.A. D.C., 170 F. 2d 793, at page 807, the court said:

"'*Qui aliquid statuerit parte inaudita altera, aequum licet dixerit, haud aequum fecerit.* He who decides anything, one party being unheard, though he should decide right, does wrong. 6 Co. 52; 4 Bla. Com. 483.' 2 Bouv. Law Dict., Rawle's Third Revision, 1914, p. 2157."

In *Railroad Commission of California* v. *Pacific Gas and Electric Company,* 302 U.S. 388, 82 L.Ed. 319, this Court held that the state commission had afforded the company a fair and full hearing, but it also stated what sort of hearing was afforded. The Court said:

"Respondent states that it was denied a proper hearing, but the record shows that the Commission held extended hearings, *at which the evidence offered by respondent was received* and its arguments presented. . . ." (Emphasis Supplied)

Here the Commission neither received nor considered the evidence offered by Petitioners, and the Court below, by its opinion, condoned such action. In the cited California case, this Court further said:

"The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. Ohio Bell Teleph. Co. v. Public Utilities Commission, 301 U.S. 292, 304, 305, 81 L.Ed. 1093, 1101, 1102, 57 S.Ct. 724. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily. Interstate Commerce Commission v. Louisville & N. R. Co., 227 U.S. 88, 91, 57 L.Ed. 431, 433, 33 S.Ct. 185; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51, 73, 80 L.Ed. 1033, 1041, 1052, 56 S.Ct. 720; Morgan v. United States, 298 U.S. 468, 480, 481, 80 L.Ed. 1288, 1294, 1295, 56 S. Ct. 906; Ohio Bell Teleph. Co. v. Public Utilities Commission, 301 U.S. 292, 81 L.Ed. 1093, 57 S.Ct. 724, supra. *As we have seen, the respondent was heard, the Commission received the testimony of respondent's witnesses, its exhibits and arguments.* There is nothing whatever to show that the hearing was not conducted fairly." (Emphasis supplied)

Here the Commission, as herein shown, did not hear the Petitioners, nor did it receive the testimony of Petitioners' witnesses or their exhibits.

In two cases decided by this Court, each styled *Morgan*

v. *United States* (the first in 298 U.S. 468, 80 L.Ed. 1288, herein designated "Morgan One", and the second in 304 U.S. 1, 82 L.Ed. 1129, herein designated "Morgan Two") the requirements for a fair hearing under the Constitution were again considered. The issue was the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stockyards. Suit was brought to enjoin enforcement of the order, the complaint alleging that Plaintiffs had not been afforded the hearing which the statute required.

In Morgan One, the district court had struck such allegation from the complaint. This Court reversed Morgan One and said:

> "Our conclusion is that the District Court erred in striking out the allegations of [Paragraph] IV of the bill of complaint with respect to the Secretary's action. The defendants should be required to answer these allegations and the question whether plaintiffs had a proper hearing should be determined." 298 U.S. p. 482, 80 L.Ed. p. 1296.

Thus, Petitioners are entitled to a determination of whether they have been afforded a full and fair hearing. Such determination the Supreme Court of Mississippi declined to consider or to make.

In Morgan One this Court also established criteria for a full and fair hearing. It said:

> "There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & S. R. Co. 265 U.S. 274, 68 L.Ed. 1016, 44 S.Ct. 565, supra. Facts and circumstances which ought to be considered must not be excluded."

• • • • •

"A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." 298 U.S. 480-81, 80 L.Ed. 1294-5.

As a result of this Court's decision in Morgan One, the case was remanded and on further testimony in the lower court as to the type of hearing the Secretary afforded, the lower court held that a fair hearing was held. On appeal of that decision, this Court, in Morgan Two again reversed holding that the proceeding before the Secretary did not constitute a full and fair hearing. This Court said (304 U.S. 18-19, 82 L.Ed. 1132-3):

"But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party *and to meet them.* The right to submit argu-

ment implies that opportunity; otherwise the right may be but a barren one." (Emphasis supplied)

The Court below justified the action of the Commission in excluding Petitioners' evidence and in denying the right of cross-examination on the issues of public convenience and necessity upon the ground that such evidence was immaterial to the issue before the Commission; that the issue before the Commission was only "whether public convenience and necessity required the construction of the enlarged facilities requested in the amended application rather than the facilities authorized in its order of March 7, 1963." Admittedly, the facilities authorized by the 1963 order had not been built at the time of the hearing on the petition to amend, nor had their construction been commenced. The project sought by the petition to amend was one in lieu of the project authorized by the original 1963 order. Therefore, whether public convenience and necessity required the enlarged project in lieu of the original project should have been determined upon the basis of the facilities, capabilities and willingness of Petitioners to provide the service, and upon comparative economic terms under which such service was available. But Petitioners were not permitted to introduced evidence upon any of these issues.

Denial of constitutional rights of Petitioners to be heard cannot be finessed by either the Commission or the Court below through a mere assertion that the offered evidence was irrelevant to the issues as they were sought to be defined. This Court has specifically so held. In *Georgia Railway and Electric Co.* v. *Decatur,* 295 U.S. 164, 79 L.Ed. 1365, there was involved an assessment of special taxes for street paving of a street on which the Company had street car tracks. The Company refused to pay the tax on the ground that it was not benefitted by the project, and suit was brought by the City of Decatur for recovery thereof.

The Court refused to receive evidence offered by the Company on the issue of benefits, and found against the Company. On appeal to this Court, the judgment was reversed, this Court saying (295 U.S. 171, 79 L.Ed. 1369-70):

> "No question is raised as to the competency of the proof which was offered, and evidently there is none. The ruling was simply that it was immaterial. But the existence of benefits resulting from the improvement was material and was deemed so—else why require it, or why create an affirmative presumption in respect of it? Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution."

The holding of the Supreme Court of Mississippi that the evidence rejected was immaterial to the issues is in direct conflict with its holding in its first opinion when it said: "The issues raised by the amended application are issues to be determined by the commission when properly presented to it". (See Appendix No. 7) Petitioners were denied the right and opportunity to do that which the Supreme Court of Mississippi said in its first opinion must be done. What the Court did in the instant opinion, Appendix 4 hereto, falls within the condemnation of this Court in *Georgia Railway and Electric Co.* v. *Decatur, supra.*

Refusal of the Commission to permit cross-examination of Respondents' witnesses, an action approved by the Court below, is likewise a denial of Petitioners' constitutional rights to a full and fair hearing. *Reilly* v. *Pinkus,* 338 U.S.

269, 94 L.Ed. 63; *Greene* v. *McElroy*, 360 U.S. 474, 3 L.Ed. (2d) 1377.

WHEREFORE, Petitioners respectfully submit that this Court should issue a writ of certiorari in this cause; that the federal question involved is substantial; and that upon review by this Court the decision of the Supreme Court of Mississippi and the order of the Mississippi Public Service Commission should be reversed and the cause remanded for a full, fair and complete hearing before such Commission.

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CERTIFICATE OF SERVICE

I, James S. Eaton of the firm of Eaton, Cottrell, Galloway & Lang, of Counsel for Petitioner, Mississippi Power Company, depose and say that on the — day of ——, 1968 I served a copy of the foregoing petition for writ of certiorari on T. Harvey Hedgepeth, Esquire, Counsel for South Mississippi Electric Power Association, by mailing the same postage prepaid to his address at the Deposit Guaranty Bank Building, Jackson, Mississippi, and upon John K. Keyes, Esquire, Attorney of record for Dixie Electric Power Association, Singing River Electric Power Association, Pearl River Valley Electric Power Association, and Southern Pine Electric Power Association, at his office in Collins, Mississippi, and upon Bennett C. Smith, Esquire, Assistant Attorney General, State Office Building, Jackson, Mississippi, Counsel for the Public Service Commission of Mississippi.

JAMES S. EATON

Sworn to and subscribed before me on this the —— day of ——, 1968.

Notary Public.

My commission expires:

APPENDIX NO. 1

Mississippi
PUBLIC SERVICE COMMISSION
Jackson

U-508

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION

IN RE: PETITION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT, OPERATE AND MAINTAIN A 65 MEGAWATT ELECTRIC GENERATING STATION IN JONES COUNTY, MISSISSIPPI, AND AN ELECTRIC TRANSMISSION SYSTEM EXTENDING FROM SAID STATION INTO VARIOUS PARTS OF EAST AND SOUTHEAST MISSISSIPPI.

ORDER GRANTING PETITION TO AMEND CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

COMMISSION ORDER OF JANUARY 4, 1967

On July 20, 1965, Petitioner, South Mississippi Electric Power Association, filed its "Petition to Amend Certificate of Public Convenience and Necessity" seeking amendment of the "Order Granting Certificate of Public Convenience and Necessity" issued by the Commission in this cause on March 7, 1963. The petition to amend sought permission to increase the capacity of both the generating facilities and the transmission facilities of the generating and transmission system authorized to be constructed and operated under and pursuant to the terms and provisions of the Order of March 7, 1963, aforesaid, and in doing so to utilize different components as to some parts of both the generating and transmission facilities and to make certain additions to both types of facilities, all of which it was averred would be needful in order to best provide for and handle the increased loads of the system, stemming from normal increases in utilization of electricity and occurring since the said original Order was issued. It was averred that the delay in construction and operation of the system following issuance of the Order of March 7,

1963, was in nowise attributable to Petitioner, but on the contrary was caused by appeals (with stay orders) from said order prosecuted by the Protestants in the cause, Mississippi Power Company and Mississippi Power & Light Company. The specific bases for the petition to amend and other circumstances in connection with the appeals aforesaid will be referred to with more particularity later in this Order.

On July 20, 1965, Petitioner filed its Motion for an Order setting the cause for hearing on the petition to amend and for notice to be issued in accordance with statute and the Commission's Utility Rules of Practice and Procedure. Pursuant to said Motion and on the same date, July 20, 1965, the Commission issued its Order setting the cause for hearing on September 7, 1965, designating the utilities and others to whom notice of such hearing should be given and ordering that notice be given to them and to the public in manner and form as set forth in said Order. On the same date, July 20, 1965, notice was issued and served in manner and form as provided by statute, and the Commission's Utility Rules of Practice and Procedure upon the parties determined by the Commission to be entitled thereto and said notice was published in The Clarion Ledger, a daily newspaper having general circulation and published in Jackson, Mississippi on the 24th day of July, 1965. Proof of publication in proper form was filed herein on July 27, 1965, and is still on file. The notice was to the effect that the cause had been by order of the Commission made returnable to the meeting of the Commission to be held on September 2, 1965; that if no protest had been filed on that date the cause would be heard on that date or another day of the term; but if protest had been filed on that date the Commission would on said return day fix a date during the term for hearing the cause.

On September 1, 1965, Mississippi Power Company filed its "Notice Pursuant to General Order No. 4" by which it asserted that it had an interest in the cause and set forth grounds of protest which it averred would be asserted in a more formal pleading to be filed later.

On September 1, 1965, Mississippi Power & Light Company filed its "Notice Pursuant to General Order No. 4" averring an interest in the cause and setting out grounds of protest which it averred would be set up in a more formal pleading to be filed later.

On September 1, 1965, Mississippi Power Company and Mississippi Power & Light Company filed their joint "Plea to Jurisdiction of Commission" averring that the Commission's Order of March 7, 1963, granting to Petitioner a certificate of public convenience and necessity had been appealed by said companies to the Chancery Court of the First Judicial District of Hinds County, Mississippi, (where it was affirmed) and thence to the Supreme Court of Mississippi where it was then pending; that said companies had by proper petition and the posting of security obtained from said Chancery Court a "Stay Order" which by operation of law operated as a supersedeas, not only during the appeal of the case to that court, but also upon the appeal of the case then pending in the Supreme Court of the State (a copy of said stay order being made Exhibit "1" to the pleading); and for that reason the Commission was without jurisdiction to hear the Petition to Amend the Certificate of Public Convenience and Necessity which had been granted under the Order of March 7, 1963.

By appropriate orders the cause was continued from term to term until the January 4, 1966 regular meeting of the Commission.

On January 4, 1966, at a regular meeting of the Commission, upon Motion of Petitioner made in open meeting, an Order was entered setting the cause for hearing on January 27, 1966, upon such matters as the parties might request and the Commission might allow to be heard preliminarily and in advance of a hearing on the merits (requests of parties being required to be filed at least five days in advance of that date).

On January 18, 1966, Mississippi Power Company and Mississippi Power & Light Company filed their joint "Motion to Require Petitioner to Furnish Specified Information" setting forth interrogatories which they sought to have answered by Petitioner; and on the same date,

January 18, 1966, also filed their joint "Motion for Time in Which to File Responsive Pleadings", asking for 60 days from and after the date on which Petitioner answered their interrogatories within which to file responsive pleadings.

On January 24, 1966, Mississippi Power Company and Mississippi Power & Light Company filed their joint "Designation of Matters Upon Which Separate and Preliminary Hearings are Requested" designating their aforesaid plea to the jurisdiction of the Commission; Motion to Require Petitioner to Furnish Designated Information; and Motion for Time to File Responsive Pleadings.

On January 26, 1966, the hearing upon preliminary matters scheduled for January 27, 1966, was by order continued until the regular February 1, 1966 meeting of the Commission. Thereafter by appropriate orders the cause was continued from term to term until the April 5, 1966 regular meeting of the Commission.

On April 5, 1966, at a regular meeting of the Commission, it being made known to the Commission that on February 14, 1966, the Mississippi Supreme Court had affirmed the Commission's Order of March 7, 1963, referred to hereinabove, and on March 21, 1966, said Court had overruled a suggestion of error in the cause; and counsel for Petitioner having requested that the cause then be set for hearing for all purposes; an Order was entered on said date, April 5, 1966, setting said cause for hearing for all purposes on April 26, 1966, at 10:00 A.M.

Thereafter, however, by appropriate orders of the Commission the cause was continued from time to time until by order the same came on to be heard for all purposes on September 1, 1966, and by proper orders the hearing was recessed and resumed from time to time (hearings being held on September 1, September 28, September 29, September 30, October 11, October 19, October 20, and October 21, 1966) until completed, at which time all parties rested, and the Commission took the cause under advisement for the rendering of a decision and entry of an order at a later date.

Meantime, in the interim between the entry of the Order on April 5, 1966, setting the cause for hearing as aforesaid and the actual commencement of the hearing on September 1, 1966, the following additional pleadings were filed and orders entered, to-wit:

(a) April 5, 1966, Petitioner filed a Response to the Plea to the Jurisdiction of the Commission previously filed jointly by Mississippi Power Company and Mississippi Power & Light Company;

(b) April 6, 1966, there was received by the Commission and filed a certified copy of "Supplemental Final Decree" of the Chancery Court of the First Judicial District of Hinds County, Mississippi, dated April 6, 1966, in that Court's Cause No. 63,128, and a certified copy of the mandate from the Supreme Court of the State of Mississippi to said Chancery Court dated April 4, 1966, in that Court's Cause No. 43,693 (including a copy of the Opinion of the Supreme Court); the effect of all of which was to show that the Order of this Commission dated March 7, 1963, granting unto Petitioner a certificate of public convenience and necessity, as aforesaid, had been affirmed by said Chancery Court and by the Supreme Court of the State; and said decree of the Chancery Court by its own terms operated as a mandate from that Court to this Commission;

(c) April 19, 1966, Mississippi Power Company filed its protest and objections to the Petition to Amend Certificate of Public Convenience and Necessity;

(d) April 20, 1966, Mississippi Power & Light Company filed its protest and objections to the Petition to Amend Certificate of Public Convenience and Necessity;

(e) May 4, 1966, Petitioner filed its response to the joint petition of Mississippi Power Company and Mississippi Power & Light Company to require Petitioner to furnish specified information;

(f) May 6, 1966, Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association, and Pearl River Valley Electric Power Association filed a joint petition for leave to intervene as parties to this cause; on the same date said

electric power associations filed a motion for an order fixing a time and place for hearing of their said petition to intervene and for the giving of notice of such hearing; on the same date the Commission entered an order fixing a time and place for the hearing of said petition to intervene, to-wit: May 31, 1966, at the hearing room of the Commission, 1105 State Office Building, Jackson, Hinds County, Mississippi, and directing that proper notice thereof be issued and served upon designated persons and that notice be given to all persons by publication as required by statute; and on the same date notice was given in manner and form as required by statute and by the Commission's Utility Rules of Practice and Procedure to all persons entitled to receive such notice as designated by the Commission and said notice was published in the Jackson Daily News, a daily newspaper having general circulation and published in Jackson, Mississippi, on May 10, 1966; proof of publication of said notice was filed herein on May 10, 1966, and is still on file;

(g) On May 31, 1966, the Commission heard said petition of Singing River Electric Power Association, et al, for permission to intervene (there were no objections thereto) and being of the opinion that the same was well taken and should be allowed entered its order allowing said Petitioners to intervene herein as parties; and on August 16, 1966, the said Petitioners filed herein their entry of appearance and "Concurrence of Intervenors in Certain Pleadings" (although this pleading was filed late, upon motion and order subsequently entered it was received and recognized);

(h) On August 16, 1966, Petitioner filed its response to "Notice Pursuant to General Order No. 4" of Mississippi Power Company;

(i) On August 16, 1966, Petitioner filed its response to the protest of Mississippi Power Company; and

(j) On August 16, 1966, Petitioner filed its response to the protest of Mississippi Power & Light Company.

When the cause came on for hearing September 1, 1966, as aforesaid, although it had been set for hearing for all

purposes, including any matters which any party might wish to be heard preliminarily and in advance of the hearing upon the merits, no party requested that any matter be heard preliminarily, neither did the Commission of its own motion determine that any matter should be heard preliminarily; therefore, the cause proceeded to hearing on the merits upon the Petition to Amend, the protests of the two Protestants, the responses to such protests by Petitioner, the entry of appearance and concurrence in certain pleadings by the Intervenors; and the other pleadings hereinabove referred to; all parties being present in person and by counsel.

From the evidence and the applicable law, the Commission makes the following findings and conclusions:

1. Petitioner is a corporation organized and operating under Chapter 184 of Mississippi Laws of 1936 (Section 5463 *et seq,* Volume 4A, Recompiled, Mississippi Code of 1942) designated by statute as the "Electric Power Association Act". As such, it has statutory and charter powers to engage in the generation and transmission of electric energy and to engage in all phases of the electrical business.

2. Petitioner is a membership corporation operated not for profit, and its members consist of Singing River Electric Power Association, Lucedale, Mississippi; Dixie Electric Power Association, Laurel, Mississippi; Southern Pine Electric Power Association, Taylorsville, Mississippi; Pearl River Valley Electric Power Association, Columbia, Mississippi; East Mississippi Electric Power Association, Meridian, Mississippi; Capital Electric Power Association, Clinton, Mississippi; Southwest Mississippi Electric Power Association, Lorman, Mississippi; Magnolia Electric Power Association, McComb, Mississippi; and Coast Electric Power Association, Bay St. Louis, Mississippi.

3. Each of said member corporations is also a non-profit corporation organized and operating under the Electric Power Association Act, aforesaid, and each is engaged in the distribution and sale of electricity to and for the public for compensation at the retail level.

4. Petitioner and each of said member corporations are public utilities as defined in Section 1 D (1) of the Public

Utilities Act of 1956 (Chapter 372, Mississippi Laws of 1956; Section 7716-01, *et seq.*, Volume 6, Recompiled, Mississippi Code of 1942).

5. The Petition to Amend contains all jurisidictional requirements under applicable law, and its allegations, if sustained by the proof, set forth sufficient grounds to warrant the issuance of an order by the Commission amending the certificate of public convenience and necessity heretofore issued to Petitioner in this cause on March 7, 1963, in manner and form substantially as prayed for therein. There were minor variations of the proposed amendment developed in the evidence representing slight changes in plans which evolved after the petition was filed and before the hearings were held, but these fall well within the prayer of the petition, particularly the prayer for general relief.

6. The aforesaid minor variations or changes in the proposed amendment to the certificate heretofore issued were made the subject of and were covered in an "Amendment to Petition to Amend Certificate of Public Convenience and Necessity" (in the nature of an amendment to conform to the proof) filed by Petitioner with leave of the Commission and without objection on October 18, 1966, and were thereby brought within the prayer of the Petition for specific relief, as well as that for general relief.

7. On March 7, 1963, the Commission issued to Petitioner in the above numbered cause a certificate of public convenience and necessity authorizing it to construct, own, operate and maintain generation and transmission facilities within the State of Mississippi as follows:

"(1) A 65 megawatt electric generating station to be located approximately two miles northwest of the Village of Moselle in Section 33, Township 7 North, Range 13 West, First Judicial District of Jones County, Mississippi, to consist of two steam driven turbo generators, each rated 22,000 kilowatts, and one gas driven turbo generator rated approximately 21,000 kilowatts, each generating unit and said station as a whole to be complete with all auxiliary equipment, machinery and facilities necessary or useful in the operation of said units and said station as a whole, including but not limited to roads, site preparation, parking areas, suitable building to house said station, yard struc-

tures, subsurface investigation, yard piping, wells, landscaping, water and fire system, steam generators, closed feed water heaters, deaerator heaters, demineralizing equipment, boiler feed pumps, fuel oil system, fuel handling and control equipment, combustion controls, power piping, stacks, condensers, intake structures, cooling towers, screens, circulating water pumps, circulating water piping, power wiring and insulation, step-up substation, oil circuit breakers, transformers, cranes and all other appropriate and related equipment and facilities of every kind and character suitable and proper to the completion of said generating station; and

"(2) Approximately 392.6 miles of 69 KV transmission line (including acquisition of rights of way) and auxiliary equipment and facilities to provide a wholesale supply of electricity to the corporate members of petitioner named below at the delivery points indicated, to-wit:

1. To Singing River Electric Power Association with delivery points as follows:

Location	County
Richton	Perry
Hintonville	Perry
McLain	Greene
Lucedale	George

2. To Pearl River Valley Electric Power Association with delivery points as follows:

Location	County
Hattiesburg	Forrest
Columbia	Marion
Bassfield	Jefferson Davis
Maxie	Forrest
Lumberton	Lamar

3. To Dixie Electric Power Association with delivery points as follows:

Location	County
Waynesboro-West	Wayne
Waynesboro-South	Wayne

Location	County
Cleo	Jones
Macedonia	Forrest
Moselle-West	Jones
Laurel	Jones

4. To Southern Pine Electric Power Association with delivery points as follows:

Location	County
Collins	Covington
Waldrup	Jasper
Newton	Newton
Rawles Springs	Forrest
Taylorsville	Smith
Sylvarena	Smith
Prentiss	Jefferson Davis
Magee	Simpson
Pinola	Simpson
Puckett	Rankin
Morton	Scott

"Said transmission lines shall follow generally the routes shown on the map Exhibit 7 in the evidence, a copy of which exhibit is attached hereto marked Exhibit "A" and made a part of this order.

"All of such transmission line construction is to be of three No. 4/0 ACSR phase wires with a three-eighths inch H.S.S. shield wire, except for 16.5 miles (from the generating station to the Collins substation) of three 336.4 MCM ACSR phase wires with the same shield wire and 4.3 miles (tap from main line to Richton substation) of three No. 2/0 ACSR phase wires with the same shield wire."

The said order is Exhibit "PA 1" in the evidence. A true and correct copy thereof (which includes a map of said generation and transmission system as Exhibit "A" thereto) is attached hereto marked Exhibit "1" and made a part of this order.

8. Petitioner was not able to immediately construct and put into operation the generation and transmission system thus certificated because:

(a) The Protestants who opposed issuance of the certificate aforesaid, Mississippii Power Company, Gulfport, Mississippi, and Mississippi Power & Light Company, Jackson, Mississippi, timely appealed from said Order of March 7, 1963, to the Chancery Court of the First Judicial District of Hinds County, Mississippi, and in doing so by petition and the posting of security in said court obtained a "stay order" which operated as a supersedeas;

(b) Said Order of the Commission of March 7, 1963, was affirmed by said Chancery Court on January 22, 1965, whereupon said Protestants-Appellants appealed from the decree of that court to the Supreme Court of the State of Mississippi and by operation of law, the aforesaid stay order remained in force and effect pending the determination of said appeal by the Supreme Court of Mississippi;

(c) Petitioner upon motion made in the Supreme Court of Mississippi secured an advancement of the hearing of the appeal in that Court as a preference case;

(d) On February 14, 1966, the Supreme Court of Mississippi likewise affirmed said Order of the Commission issued March 7, 1963; said Protestants-Appellants thereupon timely filed suggestions of error in said Court, and by operation of law said stay order remained in force and effect pending a determination of the cause upon suggestion of error in that court; and on March 21, 1966, said court overruled the said suggestions of error.

9. Petitioner was not permitted therefore to commence construction of the generation and transmission system certificated and authorized by the Commission's Order of March 7, 1963, (which in itself constituted a certificate of public convenience and necessity) until after March 21, 1966.

10. Meantime, the Petition to Amend had already been filed before the Commission July 20, 1965, averring that the delay incident to the appeals would necessitate modifications of both the generation and transmission facilities of the system to increase capacity in order to properly handle the increased loads of the system (increases normally to be expected and which inhere in the business). It was also averred that inasmuch as the delay had been

suffered, there were certain changes in units of generating facilities that could be made to advantage (for efficiency and economy) in view of the increased loads; and that certain changes in the transmission system should also be made for the same reasons. In this regard, Section 10 of the Petition to Amend reads as follows:

> "In the meantime, there have arisen opportunity and need, and the public convenience and necessity requires and will require, that the aforesaid generation and transmission facilities be modified to conform to the requirements of the system as they currently exist. If said delays had not occurred and the system had been built in its entirety immediately following the issuance of said order of March 7, 1963, the nature and character of the electric utility industry and the public needs and purposes served by it are such that it would have been necessary that additions be made to the system in respect of both generation and transmission by this time in order for it to meet and serve the growing requirements upon it (the need for additions was of course foreseen and evidence was introduced in the former hearing to show that additions would be made as needed); and since construction has been delayed such additions should now take the form of generating facilities in larger units and certain modifications in transmission facilities which will provide a better system and a more efficient operation than would be the case if the system should now be built in the exact form originally authorized and additions were made to provide system capabilities needed to meet present requirements."

11. In order to meet the increased demands upon the system, the Petition to Amend seeks an amendment to the certificate of March 7, 1963, authorizing modifications and enlargements in the generation and transmission system authorized thereby to make the same conform to and consist of substantially the following:

> "(a) 164 megawatts of generating facilities, comprising:

"(1) A 150 megawatt electric generating station to be located approximately 2 miles northwest of the Village of Moselle in Section 33, Township 7 North, Range 13 West, First Judicial District of Jones County, Mississippi, to be made up of three steam driven turbo-generators, each with a nameplate rating of 50,000 kilowatts; each generating unit and said station as a whole to be complete with all auxiliary equipment, machinery and facilities necessary or useful in the operation of said units and said station as a whole including but not limited to roads, site preparation, parking areas, suitable building to house said station, yard structures, subsurface investigation, yard piping, wells, landscaping, water and fire system, steam generators, closed feed water heaters, deaerator heaters, demineralizing equipment, boiler feed pumps, fuel oil system, fuel handling and control equipment, combustion controls, power piping, stacks, condensers, intake structures, cooling towers, screens, circulating water pumps, circulating water piping, power wiring and insulation, step-up substation, oil circuit breakers, transformers, cranes and all other appropriate and related equipment and facilities of every kind and character; and

"(2) One 14 MW outdoor package type gas turbine generator (including site acquisition) to be located near the community known as "Benndale" in the west central area of George County, Mississippi; same to include necessary dual fuel and inlet evaporator cooler, filter equipment and other ancillary equipment and facilities; and

"(b) Approximately 804.7 miles of 69 KV transmission line (including acquisition of rights of way) and auxiliary equipment and facilities to provide a wholesale supply of electricity to its aforesaid four corporate members at locations and delivery points hereinafter specifically set forth.

"All of the aforesaid transmission line is to be built new except 43.2 miles which is relatively new and will be purchased by petitioner from its member, Southern Pine Electric Power Association, Taylorsville, Mississippi, and 9.7 miles which is also relatively new and

will be purchased from its member, Pearl River Valley Electric Power Association, Columbia, Mississippi." "All of the said transmission line, both that to be built new and that to be purchased, is to be of three No. 4/0 ACSR phase wires with a three-eighths inch H.S.S. shield wire, except approximately 178.8 miles thereof (from the generating station to Rawles Springs, 10.3 miles; from Rawles Springs via Hattiesburg to Lumberton, 26.1 miles; from Rawles Springs via Oloh to Columbia, 27.7 miles; from the generating station via Moselle substation to Collins, 16.5 miles; from the generating station to Taylorsville, 22.8 miles; from the generating station via the West Laurel Substation to Hoy Substation, 19.3 miles; from the generating station to Ellisville Junction, 13.1 miles; from Ellisville Junction to Cleo Substation, 10.5 miles; and from the generating station via Macedonia and Richton (West) Substations to the Richton (East) Substation, 32.5 miles), which will be of three 336 MCM ACSR phase wires with the same shield wire; 1.7 miles, from North Collins Junction to North Collins Substation, which is of three 1/0 ACSR phase wires with the same shield wire; and 36.8 miles, from the generating station to Columbia, which will be of three 477 MCM ACSR phase wires with the same shield wire. The latter section, that with 477 MCM ACSR Phase wires, although operated initially at 69 KV, will according to present plans be operated at 161 KV beginning in fiscal year 1975-76."

(Note: The above quotation is from the Petition to Amend, as amended, and the reference in paragraph "(b)" thereof to "its aforesaid four corporate members at locations and delivery points hereinafter specifically set forth." is to Singing River, Dixie, Southern Pine, and Pearl River Valley Electric Power Associations and to delivery points where Petitioner proposes to provide wholesale service to said associations. Those points will be specifically identified and referred to later in this order.)

12. A map of said proposed modified and enlarged system appears as Exhibit "PA 14" in the evidence. A true copy of said map is attached hereto marked Exhibit "2" and made a part of this order.

13. Although the transmission system as proposed to be modified and enlarged as hereinabove set forth was estimated in the Petition to consist of approximately 804.7 miles of transmission line, the evidence showed that a closer estimate would be approximately 815.7 miles.

14. Petitioner already owns the site for the steam generating station and headquarters office to be located near Moselle in the First Judicial District of Jones County, Mississippi, said site consisting of approximately 55 acres of land. The said site is a fit and suitable site for said station as proposed to be modified and enlarged in capacity and the headquarters of the corporation, and it is at an appropriate and suitable location with respect to the delivery points on the proposed modified transmission system to afford efficiency in overall operations of the generating station and transmission system. The location of the 14 MW gas turbine generating station near Benndale in George County, as shown by the map, Exhibit "2" hereto, is an approximate location only, the exact location thereof to be determined in the final plans for the system and by site acquisition. The locations of the transmission lines as shown on the map, Exhibit "2" hereto, are but approximate locations, the exact locations thereof to be determined by final plans and specifications for the system, surveys and rights of way acquisitions.

15. Petitioner plans to use the aforesaid generation and transmission facilities to produce, transmit, and sell electric energy at wholesale to the corporate members of petitioner named below at the delivery points indicated, to-wit:

(a) To Singing River Electric Power Association with delivery points as follows:

Location	County
Lucedale	George
Leakesville	Greene
State Line	Wayne

Location	County
McLain	Greene
Hintonville	Perry
Richton-East	Perry
Rocky Creek	George
Benndale	George

(b) To Pearl River Valley Electric Power Association with delivery points as follows:

Location	County
Hattiesbury (Richburg)	Lamar
Columbia-North	Marion
Columbia-West	Marion
Bassfield	Jefferson Davis
White's Crossing	Stone
Maxie	Forrest
Lumberton	Lamar
Baxterville	Lamar
Oloh	Lamar
Oakvale	Lawrence

(c) To Southern Pine Electric Power Association with delivery points as follows:

Location	County
Prentiss	Jefferson Davis
Collins	Covington
Collins-North	Covington
Magee	Simpson
Pinola	Simpson
Puckett	Rankin
Morton	Scott
Bay Springs	Jasper
Waldrup	Jasper
Newton	Newton
Rawles Springs	Forrest
Taylorsville	Smith
Sylvarena	Smith
Rose Hill	Jasper
Decatur	Newton
Gwinville	Jefferson Davis

Location	County
Bassfield	Jefferson Davis
Magee-East	Simpson
Moss	Jasper
Stafford Springs	Jasper
Homewood	Scott
Lillian	Scott

(d) To Dixie Electric Power Association with delivery points as follows:

Location	County
Waynesboro-North	Wayne
Waynesboro-South	Wayne
Bucatunna	Wayne
Cleo	Jones
Laurel-West	Jones
Macedonia	Forrest
Moselle	Jones
Clara	Wayne
Whistler	Wayne
Hoy	Jones
Ellisville Junction	Jones
Richton-West	Perry

16. The loads proposed to be provided and served by said system as proposed to be modified and enlarged, as aforesaid, are the very same loads (with a single exception to be presently mentioned) as the loads which Petitioner was authorized to serve and provide under the terms of the certificate of public convenience and necessity originally issued to Petitioner under the Commission's Order of March 7, 1963, as aforesaid. In each instance where under the proposed modified and amended certificate Petitioner would supply power at a delivery point which was not included in the original certificate, the point is either a needed relocation of one included in the original certificate or a new load center that has developed in a part of the corporate member's system which was to be supplied by Petitioner under the original certificate. Generally the utilization of electricity by the public in this State (including the areas in which Petitioner proposed to provide wholesale

supplies) has been steadily increasing for a number of years, and it continues to increase. The nature of the generation and transmission business is such that it is not infrequently necessary in order to provide an adequate service to increase the quantity of deliveries at some places, relocate delivery points at others, and establish new delivery points at still others.

17. The single exception referred to in the preceding paragraph is the substation of Singing River Electric Power Association at Leakesville in Greene County where Petitioner proposes to provide wholesale power supply to Singing River Electric Power Association. That delivery point represents less than one per cent (1%) of the total load proposed to be provided and served by Petitioner on its system. It was not included in the original certificate issued March 7, 1963, but as shown by the undisputed evidence in the instant proceeding, it was testified in the original proceeding that Petitioner proposed to pick up that delivery point one year after initial startup (the original startup date was estimated to be about July 1, 1964, and this delivery point was proposed to be picked up about July 1, 1965). Under the proposed amendment to the certificate, Petitioner proposes to pick up that point of delivery at the startup of the modified system. The point is now served by Mississippi Power Company. In the hearing, Mississippi Power Company made no objection directed to this point of delivery as such. The point is an intermediate delivery point between the Lucedale and Rocky Creek Substations in the extreme southeastern part of Petitioner's proposed transmission system, and the State Line Substation located some 30 miles or more to the north. Without this delivery point there would be no intermediate delivery point on this line. There was sufficient evidence to warrant the Commission in finding, and the Commission does find, that the public convenience and necessity require, and will require that said delivery point be included in Petitioner's overall system.

18. Petitioner now holds the certificate issued by the Commission on March 7, 1963, and is at liberty to construct and operate the system as therein described and authorized.

That certificate is final, having been affirmed on appeal by the Chancery Court of the First Judicial District of Hinds County and by the Supreme Court of Mississippi as hereinabove set forth. The protestants applied to the Supreme Court of the United States for a writ of certiorari to review the decision of the Supreme Court of Mississippi, but on October 10, 1966, that Court denied the petition for certiorari.

19. Unless the Commission sees fit to amend the certificate issued March 7, 1963, to increase the capacity of the system therein authorized as sought by the Petition to Amend, the Petitioner proposes to build the system as previously certificated and simultaneously to apply for a certificate of public convenience and necessity to add capacity to that system in other ways, namely, by adding generation and transmission facilities. Should the system be built as previously certificated, Petitioner would not be able to pick up and serve therewith all of the loads which it was authorized to serve, but could serve only part of them unless and until it should be authorized by the Commission to construct and operate additions to that system which would increase the capacity thereof.

20. If Petitioner should follow the course of building and operating its system as originally certificated and making additions thereto, it would thereby incur a substantially larger capital investment and suffer certain losses in the efficiency of its system. As to generating facilities alone, undisputed estimates in the evidence made by Burns and McDonnell Engineering Company, engineers for the generating system, and testified to by Mr. A. F. Hartung, a partner in that firm, indicate that the "build-as-originally-certificated-and-add-on" approach would require in excess of $2 Million of capital investment over the building of "modified facilities" (including larger generating units in the steam station) approach which the Petition to Amend seeks authority to follow; and also show that there would be losses in efficiency, although it was said the exact losses in efficiency could not well be estimated. As to the transmission facilities, Southern Engineering Company, engineers for the transmission system, as shown by the testi-

mony of Mr. T. Foley Treadway, president of that company, commenced a study on the approach of building the transmission facilities as originally certificated and adding onto them but immediately saw that this approach would require substantially greater capital investment and would provide a less efficient transmission system than would be the case if the "modified system" (including certain changes in equipment and line locations but not greatly changing the overall plan of the original transmission system) should be followed; and this evidence was not disputed by any other witness.

21. It is not infrequently found to be needful and in the public interest, particularly in view of the nature of the generation and transmission business which is affected by the constantly changing and fluctuating use of electricity in various localities, and the trend toward increased use thereof generally, that certificates of public convenience and necessity be amended even before construction begins, or during construction, to meet the needs of the system. Examples of such cases may be found in this record, put there by one of the Protestants, to-wit:

(a) On August 12, 1963, in Docket U-825, the Commission granted a certificate to Mississippi Power & Light Company authorizing it to construct and operate *inter alia* approximately 140 miles of extra high voltage transmission lines to be constructed for operation at 345 KV; before said lines were built and on December 14, 1964, said Mississippi Power & Light Company filed its petition in the same cause to amend said certificate to authorize modified construction so that said lines would be operated at 500 KV instead, the added capacity being indicated by subsequent engineering studies; and to accelerate the completion date thereof, due to increases in projected loads; and on January 15, 1965, upon the bases aforesaid, the Commission granted the amendment for the modified lines with different and larger components to provide added capacity; and

(b) On August 12, 1963, in Docket U-826, the Commission granted a certificate to Mississippi Power & Light Company authorizing it to construct and operate a steam generating station near Vicksburg in Warren County,

having a capacity of 400 MW; before said station was built, and on December 14, 1964, said Mississippi Power & Light Company filed a petition to amend in the same cause and under the same docket number seeking authority to substitute a larger generating unit and increase the capacity of the station to 500 KW, because load forecasts for its system had been revised and the increased capacity was needed in order to meet the projected requirements of its system; and on January 15, 1965, the Commission granted the amendment authorizing the substitution of equipment of greater capacity and increasing the capacity of the said station to 500 MW.

(The original order in Docket U-825 is Exhibit "PA 57" in the evidence, and the order amending the certificate is Exhibit "PA 58". The original order in Docket U-826 is Exhibit "PA 59" in the evidence, and the order amending the certificate is Exhibit "PA 60".)

22. Petitioner's generation and transmission system as proposed to be modified and enlarged in capacity will constitute a modern, adequate and dependable means of providing for the requirements of the four corporate members of Petitioner at the delivery points aforesaid. The transmission system with three minor exceptions will provide full loop feed from the beginning so that any delivery point thereon may be fed from two or more directions; and any such delivery point may be supplied with power with any section of line on the system de-energized. It is not unlikely that the loads on Petitioner's corporate members' systems which Petitioner has been authorized by certificate to provide and serve will continue to grow and that proper provisions will need to be made at some future date to take care of the increased requirements (as is generally the case with all generation and transmission systems); but that is matter for another day. The Petition and evidence show for information purposes certain of Petitioner's present plans for future additions to both generation and transmission facilities; but it is also shown that these plans are subject to change; and they, of course, are not involved

here in any way other than as information with respect to present tentative plans.

23. Protestants made no serious effort to show that it would be in the public interest for Petitioner to build its system as originally certificated and add onto it rather than building the modified system with increased capacity as sought by the Petition. Rather Protestants seemed to advance the theory that since Petitioner is seeking permission to increase the capacity of its system in the manner set forth in the Petition, it has "abandoned" its original system, now proposes to build a "different" system, and it is therefore required to again prove public convenience and necessity for entering the generation and transmission field; and under this theory Protestants sought to bring up and litigate all over again the basic issues involved in the original proceeding.

24. In the opinion of the Commission, those issues have been heretofore fully litigated and decided in favor of Petitioner and against Protestants; and that determination has been affirmed by the highest Court of our State. For all purposes of this proceeding, Petitioner is in the opinion of the Commission already in business in the generation and transmission field. If this view were not adopted, it would be easy to see how a Petitioner might file its petition, prove its case, be awarded a certificate to enter the field, be carried up on appeals by Protestants, win in the courts, find that its loads had increased in the interim; start all over again by petition to modify its facilities to provide for the increased loads (the Commission judicially knows loads have been for a long time increasing at the rate which doubles them at intervals of from seven to ten years) only to be met again by Protestants (who may have, in the meantime, mended their ways and better prepared themselves to protest) and if fortunate enough to win again, again start the journey on appeals; and so on *ad infinitum;* so that even the most deserving Petitioner, under the most impelling circumstances insofar as the public interest is concerned, might find itself continually applying for certificates but never able to enter the field. This sort of situation could approach the making of some utilities "captive

customers" of others, a thing frowned upon by our Supreme Court in this very case (*Mississippi Power Company, et al* vs. *South Mississippi Electric Power Association, et al* 123 So. 2d 163, 170); and certainly such a situation would, for obvious reasons (suppression of competition, protracted litigation, unnecessary expense, etc.) be inimicable to the public interest.

25. Petitioner is able to finance the system as proposed to be modified and enlarged. The estimate of investments are summarized in Exhibit "PA 45," as follows:

"South Mississippi Electric Power Association
Summary of Investment

(Certificated System as Proposed to be Modified by Amendment of Certificate)

1. Production Plant	$24,346,200
2. Transmission Plant	11,468,965
3. General Plant	195,000
4. Working Capital	430,000
5. Overhead During Construction	89,200
6. Organization and Development	200,000
Total	$36,729,365"

These estimates include all expense and outlays up to the time when the system will be in operation with sufficient revenues to permit operations to be carried on on the basis of operating income.

Petitioner has, as shown by Exhibit "PA 16," funds on hand and loan commitments from Rural Electrification Administration aggregating $36,766,005.84. Petitioner owns the site for the steam generating station near Moselle and it is paid for. Petitioner has no accounts payable. The estimates which make up the summary of investments shown in Exhibit PA-45 are in the opinions of the witnesses presenting them full and adequate and indeed more than adequate. These estimates have not been questioned by other witnesses.

(The aforesaid estimates do not include the cost of acquiring approximately 43.2 miles of 69 KV line from South-

ern Pine Electric Power Association or the cost of acquiring approximately 9.7 miles of 69 KV line from Pearl River Valley Electric Power Association (these lines are practically new, are in excellent condition, and Petitioner proposes to acquire them to be operated as parts of its transmission system) inasmuch as these acquisitions are to be made (per contracts between Petitioner and said associations) on the basis of debt assumptions involving no cash expenditures.)

26. Studies made by Petitioner's engineers based on the usual data (power requirements forecasts, investment estimates, operating costs estimates, estimates of revenues, etc.) show that Petitioner will be able to produce and deliver power to its corporate members under operation of the modified and enlarged system with increased capacity at a lesser net cost per KWH delivered than similar estimates in the original proceeding showed would be the case in operating the system as the same was certificated and authorized by the Order of March 7, 1963. These studies and estimates are considered to be reasonably dependable.

27. Petitioner has an assured market for its output. It has power supply contracts with its four corporate members aforesaid (Intervenors) extending to December 31, 2010, and thereafter until one of the parties gives to the other six months notice of cancellation. These contracts cover the 52 delivery points hereinabove named and also provide that other delivery points may be added from time to time by mutual consent.

28. The primary fuel for the steam generating station near Moselle and also the gas turbine station near Benndale will be natural gas. A United Gas Pipe Line Company line crosses the site of the steam station near Moselle; and the same company has a line in the vicinity of the area where the gas turbine station is to be located. Petitioner has a dependable arrangement with United Gas Pipe Line Company for adequate gas supply as fuel for both stations. The equipment in both stations will use oil as a standby or emergency fuel and Petitioner has adequately provided for oil storage and other facilities at both stations to take care of emergency situations. Adequate supplies of oil are avail-

able in both localities. In the Commission's opinion, Petitioner's arrangements for fuel supply at both places for both regular operations and emergency operations are adequate.

29. If the Commission should pursuant to the Petition to Amend enter an order herein amending Petitioner's certificate of March 7, 1963, it would not take from either of the Protestants any power load (with the single exception of the Leakesville Delivery Point which has already been dealt with hereinabove); but would affect only the loads previously certificated to Petitioner under the Order of March 7, 1963.

30. From all of the evidence, the Commission is of the opinion and finds that upon the generation and transmission system as proposed to be modified and enlarged being constructed and put into operation Petitioner will be able to carry on a sound business operation.

31. From all of the evidence, the Commission is of the opinion and finds that the granting of an order herein amending the certificate of public convenience and necessity heretofore granted to Petitioner by the Order of March 7, 1963, in manner and form as sought by the Petition to Amend would materially benefit the Petitioner, the four corporate members of Petitioner to be supplied with power at wholesale by Petitioner and that segment of the public served by said corporate members of Petitioner; this would be particularly true in that Petitioner would thereby be enabled to build its system up to the capacity presently required in a more orderly way with a substantially smaller capital investment and would obtain a more efficient operation than would be the case if it approached the problem by building the system as originally certificated and making additions thereto.

32. On the whole record herein, the Commission is of the opinion and finds that the Petitioner has sustained its Petition to Amend its certificate of public convenience and necessity heretofore granted on March 7, 1963, by the evidence and that the public convenience and necessity require and will require that the Commission issue an order herein amending said certificate of public convenience and neces-

sity in manner and form as sought and prayed for in the Petition to Amend, as amended.

33. The Commission finds that proper process in the manner and for the time required by law was duly served on all parties in interest herein and that the Commission has full jurisdiction of the parties and the subject matter and has full power and authority to do all that is done herein.

IT IS, THEREFORE, ORDERED AND ADJUDGED as follows:

1. The certificate of public convenience and necessity heretofore issued to Petitioner in this cause on March 7, 1963, be and it is hereby amended so as to authorize modifications and changes in the generation and transmission facilities and system therein described and authorized to be constructed, owned and operated by Petitioner, South Mississippi Electric Power Association, to make said facilities and said system conform to and consist of the following:

(a) 164 megawatts of generating facilities, comprising:

(1) A 150 megawatt electric generating station to be located approximately two miles northwest of the Village of Moselle in Section 33, Township 7 North, Range 13 West, First Judicial District of Jones County, Mississippi, to be made up of three steam driven turbo-generators, each with a nameplate rating of 50,000 kilowatts; each generating unit and said station as a whole to be complete with all auxiliary equipment, machinery and facilities necessary or useful in the operation of said units and said station as a whole, including but not limited to roads, site preparation, parking areas, suitable building to house said station, yard structures, subsurface investigation, yard piping, wells, landscaping, water and fire system, steam generators, closed feed water heaters, deaerator heaters, demineralizing equipment, boiler feed pumps, fuel oil system, fuel handling and control equipment, combustion controls, power piping, stacks, condensers, intake structures, cooling towers, screens, circulating water pumps, circulating water piping, power wiring and insulation, step-up substation, oil circuit breakers, transformers, cranes and all other appropriate

and related equipment and facilities of every kind and character; and

(2) One 14 MW outdoor package type gas turbine generator (including site acquisition) to be located near the community known as "Benndale" in the west central area of George County, Mississippi; same to include necessary dual fuel and inlet evaporator cooler, filter equipment and other ancillary equipment and facilities; and

(b) Approximately 815.7 miles of 69 KV transmission line (including acquisition of rights of way) and auxiliary equipment and facilities to provide a wholesale supply of electricity to the corporate members of petitioner named below at the delivery points indicated, to-wit:

(1) To Singing River Electric Power Association with delivery points as follows:

Location	County
Lucedale	George
Leakesville	Greene
State Line	Wayne
McLain	Greene
Hintonville	Perry
Richton-East	Perry
Rocky Creek	George
Benndale	George

(2) To Pearl River Valley Electric Power Association with delivery points as follows:

Location	County
Hattiesburg (Richburg)	Lamar
Columbia-North	Marion
Columbia-West	Marion
Bassfield	Jefferson Davis
White's Crossing	Stone
Maxie	Forrest
Lumberton	Lamar
Baxterville	Lamar
Oloh	Lamar
Oakvale	Lawrence

(3) To Southern Pine Electric Power Association with delivery points as follows:

Location	County
Prentiss	Jefferson Davis
Collins	Covington
Collins-North	Covington
Magee	Simpson
Pinola	Simpson
Puckett	Rankin
Morton	Scott
Bay Springs	Jasper
Waldrup	Jasper
Newton	Newton
Rawles Springs	Forrest
Taylorsville	Smith
Sylvarena	Smith
Rose Hill	Jasper
Decatur	Newton
Gwinville	Jefferson Davis
Bassfield	Jefferson Davis
Magee-East	Simpson
Moss	Jasper
Stafford Springs	Jasper
Homewood	Scott
Lillian	Scott

(4) To Dixie Electric Power Association with delivery points as follows:

Location	County
Waynesboro-North	Wayne
Waynesboro-South	Wayne
Bucatunna	Wayne
Cleo	Jones
Laurel-West	Jones
Macedonia	Forrest
Moselle	Jones
Clara	Wayne
Whistler	Wayne
Hoy	Jones
Ellisville Junction	Jones
Richton-West	Perry

All of the said transmission line is to be of three No. 4/0 ACSR phase wires with a three-eights inch H.S.S. shield wire, except approximately 178.8 miles thereof (from the generating station to Rawles Springs, 10.3 miles; from Rawles Springs via Hattiesburg to Lumberton, 26.1 miles; from Rawles Springs via Oloh to Columbia, 27.7 miles; from the generating station via Moselle Substation to Collins, 16.5 miles; from the generating station to Taylorsville, 22.8 miles; from the generating station via the West Laurel Substation to Hoy Substation, 19.3 miles; from the generating station to Ellisville Junction, 13.1 miles; from Ellisville Junction to Cleo Substation, 10.5 miles; and from the generating station via Macedonia and Richton (West) Substations to the Richton (East) Substation, 32.5 miles) which will be of three 336 MCM ACSR phase wires with the same shield wire; 1.7 miles, from North Collins Junction to North Collins Substation, which is of three 1/0 ACSR phase wires with the same shield wire; and 36.8 miles, from the generating station to Columbia, which will be of three 477 MCM ACSR phase wires with the same shield wire. The latter section, that with 477 MCM ACSR phase wires, although to operate initially at 69 KV, is to be so constructed that it may later be operated at 161 KV.

(c) The site for the 150 megawatt electric generating station to be located approximately two miles northwest of the Village of Moselle in Section 33, Township 7 North, Range 13 West, First Judicial District of Jones County, Mississippi, shall be at such place on the 55 acre site presently owned by Petitioner as shall be determined in Petitioner's final plans and specifications for the system; the location of the 14 megawatt gas turbine generating station near Beindale, in George County, Mississippi, as shown by the map, Exhibit "2" hereto, is an approximate location only, the exact location thereof to be determined in the final plans and specifications for the system and by site acquisition; and the locations of the transmission lines as shown upon the map, Exhibit "2" hereto, are but approximate locations, the exact locations thereof to be determined by the final plans and specifications for the system and by surveys and rights of way acquisitions; and

(d) This order shall be in full force and effect on and after its date of issuance.

ORDERED AND ADJUDGED by the Public Service Commission of the State of Mississippi and under its official seal on this the 4th day of January, 1967.

E. W. ROBINSON,
Executive Secretary

BES/et

CC: South Miss. EPA, Miss. Power & Light Co., Miss. Power Company, Pearl River Valley EPA, Capital EPA, Coast EPA, Dixie EPA, Southern Pine EPA, East Miss. EPA, Southwest Miss. EPA, Singing River EPA, Mr. R. D. Morrow, Hon. James S. Eaton, Hon. T. Harvey Hedgepeth, Hon. John K. Keyes, Mr. Howard Langfitt, Hon. Sherwood W. Wise, Hon. Thos. H. Watkins, Hon. David C. Welch, Magnolia EPA.

(Exhibit A to Appendix No. 1)

Mississippi
PUBLIC SERVICE COMMISSION
Jackson

Before the Public Service Commission of Mississippi

U-508

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION

Re: PETITION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT, OPERATE AND MAINTAIN A 65 MEGAWATT ELECTRIC GENERATING STATION IN JONES COUNTY, MISSISSIPPI, AND AN ELECTRIC TRANSMISSION SYSTEM EXTENDING FROM SAID STATION INTO VARIOUS PARTS OF EAST AND SOUTHEAST MISSISSPPI.

ORDER GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

On March 31, 1960, petitioner, South Mississippi Electric Power Association, filed its petition for a certificate of public convenience and necessity to construct, operate and maintain an electric generation and transmission system to be composed of a 65 megawatt (nameplate rating) generating station located on a 55 acre site owned by petitioner on the Leaf River about two miles west of the Village of Moselle in Jones County, Mississippi, and approximately 392.6 miles of transmission line extending out from that point to serve at wholesale 26 delivery points of four electric power associations (members of petitioner) in 17 counties in the southeastern part of Mississippi.

The petition set up as grounds both (1) grandfather rights under Section 5(b) of Chapter 372, Mississippi Laws of 1956 (hereinafter referred to as the "Act"), and (2) public convenience and necessity under Section 5(c) of the Act. The alleged factual bases for both grounds were set out in some detail in the petition.

The petitioner had previously on September 28, 1956, filed its application for a "grandfather" certificate under Section 5(b) of the Act (Cause No. U-124). A copy of the petition in U-124 including all exhibits thereto was annexed to and made an exhibit to the petition in this cause (U-508). The theory of the petition in this cause was that petitioner had a right to the certificate sought by virtue of its "grandfather" rights under Section 5(b) of the Act and that these rights had been duly claimed and preserved by the filing of the petition in U-124 within the six months period allowed for that purpose following the effective date of the Act and since that right existed it could, if sustained by the proof, constitute a ground for a certificate in this cause; that apart from "grandfather" rights petitioner also had a right to such a certificate under Section 5(c) of the Act because the public convenience and necessity required and would require that such certificate be issued to it for the reasons set out in the petition; and that both grounds could be asserted in this proceeding.

On April 4, 1960, notice was issued and served in the manner and form provided by statute upon the parties determined by the Commission to be entitled thereto and said notice was published one time in the Jackson Daily News, a daily newspaper having general circulation and published in Jackson, Hinds County, Mississippi, on the 13th day of April, 1960. Proof of such publication in proper form was filed April 15, 1960, and is still on file. The notice was to the effect that the cause was returnable to the regular meeting of the Commission to be held on May 3, 1960; that if no protests were filed by that date the cause would be heard on that date or another day of the term; but if protests should be filed the Commission would on said return day fix a date during the term for hearing the cause.

On April 27, 1960, Mississippi Power Company filed the following:

1. Notice of Desire to Protest and to Participate as an an Interested Party Pursuant to General Order No. 4;

2. Motion to Strike Certain Matters and Allegations Contained in the Petition;
3. Plea in Abatement;
4. Motion to Quash Notice;
5. Motion to Require Singing River Electric Power Association, Lucedale, Mississippi; Dixie Electric Power Association, Laurel, Mississippi; Southern Pine Electric Power Association, Taylorsville, Mississippi; and Pearl River Valley Electric Power Association, Columbia, Mississippi; to be made parties as "Co-petitioners"; and
6. Motion to Dismiss the Petition.

On April 27, 1960, Mississippi Power & Light Company filed the following:

1. Notice of Desire to Protest and Participate as an Interested Party Pursuant to General Order No. 4;
2. Motion to Strike Certain Matter from the Petition;
3. Plea in Abatement;
4. Motion to Quash Notice; and
5. Motion to Dismiss Petition.

On May 13, 1960, Mississippi Power & Light Company field an additional motion to dismiss the petition, adding other grounds.

On May 26, 1960, the Commission, pursuant to motions of protestants Mississippi Power Company and Mississippi Power & Light Company, entered an order allowing thirty days additional time within which protests might be filed, and on June 23, 1960, protests were filed by each of said protestants. The protests essentially denied the material allegations of the petition and set up sundry affirmative matters as grounds for protests, the greater part if not all of which had already been presented in the pleas and motions referred to above.

The pleadings were voluminous and a number of days were required to hear preliminarily the various pleas and motions and make disposition of them. No attempt will be made to recite in this order the step by step proceedings as such would require many pages and is not deemed

necessary. The results of extended hearings upon all the pleas and motions which settled the pleadings and brought the cause to the point of a hearing upon the merits may be summarized as follows:

1. The motions of protestants to strike out certain parts of the petition were sustained in part and overruled in part, resulting in striking from the petition the following matter: The second sentence of paragraph 9; and sub-subparagraphs 1, 2, 3, 5, and 7 of subparagraph (d) of paragraph 23.

2. The motion of Mississippi Power Company to require Singing River, Dixie, Southern Pine and Pearl River Valley Electric Power Associations to enter the cause as "co-petitioners" was treated as a motion to require said corporations to become "parties" and was sustained. The order gave said corporations the option to enter the proceeding as "co-petitioners" at any time within thirty days after the date of the notice issued to them, failing in which they would be treated as respondents. The said corporations did not choose to appear as co-petitioners and therefore became respondents. They filed an appearance and answer as respondents on August 1, 1960, in which they in effect confessed the petition in all its parts.

3. All other of the motions and pleas listed above were overruled. In each instance there was a petition for rehearing of the motion or plea and in each instance such petition was denied.

4. There were motions by both protestants for orders allowing "interlocutory appeals" to the Chancery Court of the First Judicial District of Hinds County on certain of the Commission's orders overruling pleas and motions in order to "settle the controlling principles." These motions were overruled.

5. Meantime petitioner had filed "Response" to the affirmative matter contained in protests of the two protestants.

6. The cause thus reached the point of being ready for hearing upon the merits on the basis of the petition (with the specified deletions); the protests of the two protestants; the responses of petitioner to the affirmative matter con-

tained in the protests; and the answers of the respondents.

7. In the meantime on May 3, 1960, petitioner had filed a motion in this cause and in Cause No. U-124 for consolidation of the two causes for purposes of hearing, and on June 28, 1960, after hearing, that motion was sustained for the reasons set forth in the order of that date. The order specified, however, that the consolidation was for purposes of hearing only and that after hearing separate orders would be entered in the two causes. Therefore, it was the consolidated hearing of the two causes upon the merits that was next in order.

At this juncture, on August 2, 1960, protestants appeared before one of the judges of the Chancery Court of the First Judicial District of Hinds County, Mississippi, and secured an order allowing an appeal to that court upon certain of the orders of the Commission on the pleas and motions aforesaid to "settle the controlling principles"; on the same date protestants also took what were termed "direct appeals" from those orders; therefore, proceedings were suspended before the Commission pending the outcome of the appeals.

The Chancery Court after hearing dismissed the appeals. Protestants then appealed to the Supreme Court of Mississippi and that court, after hearing, likewise dismissed the appeals. The Supreme Court ordered that the cause be remanded to the Commission for hearing upon the merits.

On May 1, 1961, the cause was remanded to the Commission by means of certificate by the Clerk of said Chancery Court, to which was exhibited the supplemental final decree of that court of April 27, 1961, the opinion of the Supreme Court rendered February 27, 1961, and the mandate of the Supreme Court dated April 14, 1961. Thereby the cause was back before the Commission for hearing upon the merits. On May 2, 1961, pursuant to motion of protestants the Commission entered an order resuming jurisdiction of the cause; setting this cause and U-124 for consolidated hearing on the merits on June 6, 1961, a regular meeting date of the Commission; adjudicating the names and addresses of all parties in interest who would be entitled to notice of such consolidated hearing; and ordering that

notice of such hearing be given to all such parties in manner and form required by law.

On May 2, 1961, due and proper notice of such consolidated hearing was issued and served upon the parties and persons entitled to such notice as determined by the Commission's order of May 2, 1961, aforesaid, to-wit: Mississippi Power Company, Gulfport, Mississippi; Mississippi Power & Light Company, Jackson, Mississippi; Coast Electric Power Association, Bay St. Louis, Mississippi; Singing River Electric Power Association, Lucedale, Mississippi; Pearl River Valley Electric Power Association, Columbia, Mississippi; Dixie Electric Power Association, Laurel, Mississippi; Southern Pine Electric Power Association, Taylorsville, Mississippi; East Mississippi Electric Power Association, Meridian, Mississippi; Central Electric Power Association, Carthage, Mississippi; Yazoo Valley Electric Power Association, Yazoo City, Mississippi; Capital Electric Power Association, Clinton, Mississippi; Southwest Mississippi Electric Power Association, Lorman, Mississippi; Magnolia Electric Power Association, McComb, Mississippi; Mayor and Board of Aldermen, Town of Prentiss, Prentiss, Mississippi; and Mayor and Board of Aldermen, Town of Collins, Collins, Mississippi. Said notice was also published one time in the daily Clarion-Ledger, a daily newspaper of general circulation published in Jackson, Hinds County, Mississippi, on the 10th day of May, 1961. On July 5, 1961, proof of publication of said notice was filed here.

By proper orders entered at the regular June and July, 1961 terms, said hearing was continued and at the regular meeting convened on August 1, 1961, said hearing was set for August 2, 3, 15 and 16, 1961, so that the consolidated hearing of the two causes upon the merits was actually commenced at 10:00 o'clock A.M. on August 2, 1961, and was carried forward on the other specified dates in August, 1961. By intermediate orders entered from time to time, said hearing was recessed and resumed from time to time until the same was finally concluded on December 18, 1962, at which time briefs were received simultaneously from petitioner and the protestants and oral arguments were

heard. All told there were 78 hearing days including those devoted to preliminary hearings and those devoted to the merits.

At the conclusion of the hearings on December 18, 1962, the causes were by appropriate order taken under advisement for study of the transcript of the record, the exhibits and the briefs of all parties and for decisions to be handed down at a later date.

From the evidence and the applicable law, the Commission makes the following findings and conclusions:

1. Petitioner is a corporation organized and operating under Chapter 184, Mississippi Laws of 1936 (Section 5463 et seq., Volume 4A, Recompiled, Mississippi Code of 1942) designated by statute as the "Electric Power Association Act." As such it has statutory and charter powers to engage in the generation and transmission of electric energy and to engage in all phases of the electrical business.

2. Petitioner is a membership corporation operated not for profit, and its members consist of Singing River Electric Power Association, Lucedale, Mississippi; Dixie Electric Power Association, Laurel, Mississippi; Southern Pine Electric Power Association, Taylorsville, Mississippi; Pearl River Valley Electric Power Association, Columbia, Mississippi; East Mississippi Electric Power Association, Meridian, Mississippi; Capital Electric Power Association, Clinton, Mississippi; Southwest Mississippi Electric Power Association, Lorman, Mississippi; Magnolia Electric Power Association, McComb, Mississippi; and Coast Electric Power Association, Bay St. Louis, Mississippi.

3. Each of said member corporations is also a nonprofit corporation organized and operating under the Electric Power Association Act aforesaid and each is engaged in the distribution and sale of electricity to and for the public for compensation at the retail level.

4. Petitioner and each of said member corporations are public utilities as defined in Section 1 D (1) of the Act.

5. The petition, after deletions made by the order sustaining the motions to strike, contains all jurisdictional requirements under applicable law and its allegations if sustained by the proof set forth sufficient grounds on both

(a) "grandfather" rights under Section 5(b) of the Act, and (b) public convenience and necessity under Section 5(c) of the Act, to warrant the issuance of the certificate of public convenience and necessity prayed for.

6. It was permissible and proper under the facts and circumstances of this cause for the two causes, U-124 and U-508, to be heard together in a consolidated hearing as was done. In such circumstances it was also permissible and proper for the petitioner to assert in its petition in this cause not only the ground of public convenience and necessity but also bring forward and claim and assert the ground of any grandfather rights it might have and which had been duly claimed and applied for in Cause No. U-124. If either grandfather rights or public convenience and necessity, or both, shall be sustained by the proof the issuance of a certificate herein would be in order; if neither is sustained no certificate should be issued.

7. In the opinion of the Commission, petitioner sustained by the evidence its right to a certificate of public convenience and necessity under the "grandfather" clause, Section 5(b) of the Act, for the reasons set forth in a separate order in Cause U-124 this day issued. That order is incorporated herein by reference and made a part hereof.

8. The petition in this cause seeks a certificate of public convenience and necessity to construct, operate and maintain a generation and transmission system briefly described as follows:

(a) A 65 megawatt (nameplate rating) generating station located on a 55 acre site owned by petitioner on the Leaf River about two miles west of Moselle in Jones County, Mississippi, consisting of two steam driven turbo generators, each rated at 22 megawatts, and one gas driven turbo generator rated at approximately 21 megawatts, and with each unit as well as the station as a whole, all incidental and related equipment and facilities are to be included; and

(b) Approximately 392.6 miles of 69 KV transmission line to deliver power to 26 delivery points for sale at wholesale to the four distributing corporations which are respondents herein.

9. The said site appears to be a fit and suitable site for said station and is at an appropriate location with respect to the delivery points to afford efficiency in over-all operations of the generation and transmission system.

10. The primary fuel will be natural gas and a gas line of United Gas Pipe Line Company crosses the site in close proximity to the location of the generating station. The petitioner has arrangements, according to the testimony, with United Gas Pipe Line Company whereby a dependable supply of natural gas is assured. The standby or emergency fuel is oil and the plans for the station include facilities for storage of the oil of a standby supply for up to ten days of operations and the supply may be replenished. The emergency fuel supply appears to be adequate and dependable. The plans call for construction in order that coal facilities can be added if the time ever comes when coal is necessary or more economical for fuel.

11. The record in this cause is exceedingly lengthy (7,154 pages) and the exhibits are many and voluminous (478 in number). Many of the witnesses were experts and necessarily testified as to opinions and their estimates. In some instances these opinions and estimates varied greatly as between witnesses for the petitioner and witnesses for the protestants. The Commission is of the opinion that all of the witnesses were men of ability and integrity. Yet their opinions differed. The fact that there were differences of opinions amongst them does not relieve this Commission of the responsibility of determining the issues presented in this cause.

12. For a number of years there has been a constant need for additional generation and transmission facilities in this state and this need will continue to grow. The need for more generating capacity is greater than the capacity of the facilities which petitioner proposes to construct and operate. This is true despite the splendid interconnections which protestants have with other sources and systems within their own respective groups (Mississippi Power Company is a member of the Southern Company group and Mississippi Power & Light Company is a member of the Middle Utilities, Inc. group) and also with systems outside these groups. There is sufficient evidence to

sustain this finding. It is enough to mention that: Mississippi Power Company has found it necessary to begin building immediately for operation in 1965 and 1966 approximately 200,000 to 240,000 KW of generating capacity and a substantial quantity of transmission facilities, not only to handle this particular output but to strengthen its transmission system otherwise; leaving aside the benefits of interconnections, both protestants have already exceeded in loads their generating capabilities with the largest unit in the system down (in other words, without interconnections their generating capabilities will not sustain their load requirements with firm power); Exhibit 23 shows that from 1956 to 1960 Mississippi Power Company's sales to ultimate consumers and electric power associations increased by 49.1%; Exhibit 24 shows that for the same period Mississippi Power & Light Company's increased by 39.2%. Exhibit 211 shows that in a ten year period from 1950 through 1960 the four respondents had an increase in power sales of 260.20% and the nine members of South Mississippi Electric Power Association had an increase of 262.43%.

13. The construction and operation of petitioner's proposed system would not result in uneconomic duplication of facilities of other utilities. This record does not show that any substantial duplication of transmission facilities would be produced by the construction of the proposed system by the petitioner. In virtually all instances protestants' transmission lines were already in place before the delivery points were established thereon to serve the respondents. Only in a few instances would the transmission lines of petitioner's proposed system physically parallel those of protestants.

14. Petitioner's system if constructed and operated would be a dependable system of modern design and construction, all new, and would provide adequate and dependable service to the respondents. It is contended by protestants that the service would not be as good as respondents now receive at the delivery points now being served because there will be but one generating station or source of power and the transmission system is the "radial" type not providing dual or loop feed. It is difficult to determine which source

would provide the more dependable service, the present suppliers or the petitioner, but all things considered the Commission is of the opinion that the service would be good and dependable from either source. With respect to the lack of dual or loop feed, it is shown by the evidence that petitioner's plans call for closing the loops in its transmission system in the second year of operation and in the meantime the new and modern transmission system with the best of protection against lightning and other hazards should provide an adequate service. This view is sustained by the unqualified opinion of some of the experts. As to the source of power, there is proposed in petitioner's system adequate standby generating facilities.

15. Petitioner has an assured market for its output. It has power supply contracts with the respondents extending to August 11, 1998, and thereafter until one of the parties gives to the other six months notice of cancellation. These contracts cover 26 delivery points and the testimony showed five others to be added within two years of commencing operations. The contracts also provide that other delivery points may be added from time to time by mutual consent. There was some question raised as to the capacity of the system to serve the contract loads, but none as to a sufficient market.

16. In the opinion of the Commission the generating station as planned will have ample capacity to supply the anticipated loads. The loads were estimated by the witness Everett R. Brown with some refinements being added by George B. Taylor. These estimates have not been seriously questioned. Brown is undoubtedly an expert in the field of forecasting loads and has had long experience in that field. Taylor is an electrical engineer and was qualified to make the adjustments he made to interpolate the loads for odd years (Brown's estimates were for even years), shift the loads to fiscal years, omit certain quantities of power not to be supplied by petitioner during the first and second years, and make allowances for diversity and transmission losses. From the testimony in the case in chief there was some doubt that the generating station as planned would carry these loads adequately during the peak period (15 minutes) that occurs once in each year, but this doubt was

dispelled by the rebuttal evidence showing considerably more capacity in each turbo generator unit than was known at the time of presenting the case in chief. This was due to improvements in manufacturing.

17. Petitioner is able to finance the construction of the system for which a certificate is sought. This ability has been seriously questioned by protestants' witnesses, but in our view it is well established. The estimates have been summarized in Exhibit 119 as follows:

"South Mississippi Electric Power Association Summary of Investment Required for the System Expected to Operate Initially July 1, 1964

	Investment
(1) Production Plant	$10,260,800
(2) Transmission Plant	4,727,800
(3) General Plant	126,100
(4) Working Capital	172,000
(5) Overhead During Const.	58,400
(6) Organization & Development	100,000
(7) Total	$15,445,100"

Burns & McDonnell Engineering Company, Kansas City, Missouri, represented by the witness Hartung, made the estimates on the generating station or production plant. These estimates are detailed in Exhibits 113 and 114 and were elaborated upon in the testimony of Mr. Hartung. Pending the hearing, firm contracts were obtained on certain of the heavy equipment (representing nearly 50% of the total estimated cost of the generating station) which showed that the cost of those items would be $206,065 less than estimated. One of the contracts has expired, but the others have been extended and are still in force and they represent $176,065 of the savings under estimates. Moreover, a price reduction was obtained by petitioner through negotiations with the manufacturer on the turbo generators in the amount of $272,000 just before the hearings in this cause were concluded. Therefore, on less than half of the total estimate of the investment in the generating station economies of $448,065 below estimates seem assured.

The cost of the transmission system was estimated by Southern Engineering Company represented by the witness Treadway. Mr. Treadway has had broad experience in this field. The soundness of his estimates were sustained by the testimony of Mr. Stuart C. Irby, Jr., President of Irby Construction Company, Jackson, Mississippi, one of the leading contractors in the country in building electric and telephone lines.

Mr. Irby gave estimates showing minimum and maximum costs of such construction on a per mile basis which he thought would be developed in competitive bidding and testified that his company would take the job for his maximum estimates and possibly take it at his minimum estimates. His maximum estimates were below the estimates of Mr. Treadway. In summary, if the transmission lines were built at Irby's minimum estimates the economy would be $210,761; if at his maximum $52,896.

Mr. Treadway's company also made the estimates and he testified to them on the lesser items of "general plant" (except for one item $11,000 which was supplied by Mr. Hartung), "working capital" and "overhead during construction." The item of "organization and development" was supplied by J. T. Dudley, petitioner's General Manager.

Petitioner's principal means of financing the construction of the system is the proceeds of REA loan commitments aggregating $16,071,000. It, therefore, seems to be reasonably established that petitioner will be able to finance the construction of the system well within available funds.

18. The exhibits and testimony on both sides are voluminous. Neither side made comparisons of cost on bases identical with the other. Neither would admit that any but its own bases were valid. The over-all cost of construction and operation materially affected all estimates and the estimates on these investments varied greatly. The engineers testifying for protestants though the generating station, the general plant, the transmission system, the staffing of the various phases of the operation, and the mode of operation should be different in many respects, too numerous to undertake detailing, to the plans made by petitioner and its engineers. All these variations meant varia-

tions in investments and operating costs; and even with respect to items which all of the engineers agreed were needed and suitable for their intended purposes, there were substantial differences of opinion as to cost.

To undertake a detailed analysis of all of the studies, exhibits and tabulations and the detailed testimony thereon and point out the differences of opinion amongst the experts and set out in each instance and on each point whether the Commission agreed with this witness or that, and why, would require a book and would be of doubtful value in the end. Suffice it to say, the Commission has examined all of the exhibits and carefully heard their contents explained in great detail by the witnesses, has carefully weighed all the evidence in this regard and having considered the question of costs most carefully there is no way to harmonize the widely varying opinions of the witnesses, and indeed since they proceed in large part upon different premises and bases it is difficult to even compare them.

19. In addition to other considerations, the following matters support the proposition that the public convenience and necessity require and will require that the certificate sought by this proceeding be granted:

(a) On occasions the associations have sought new delivery points believed by them to be needed in their systems, such points to be situated both on the transmission lines of protestants and away from those lines, and those delivery points were denied to them. The associations believe they were made to operate under unfair and uneconomic conditions by these denials on account of line losses, poor voltage regulations and other incidents of spreading their operations too thin in areas where they needed more power and better voltage conditions.

(b) The protestants have declined in some cases to build transmission lines to reach the load centers established by, or believed by the associations to be necessary. The parties are not in agreement as to what constitutes a "load center." Of the 26 delivery points proposed to be served by petitioner eight are not on any transmission line of either protestant. If petitioner provides the supply its transmission lines will reach all these delivery points. If not, ac-

cording to the testimony of witnesses, respondents will be obliged (if they are to have service where they believe they need it) to provide, operate and maintain transmission lines between these points and transmission lines of protestants.

20. To shift the loads involved from the protestants to petitioner will not materially affect that part of the public being served by protestants. Based on 1960 business it would have affected only 4.14% of Mississippi Power Company's revenue, and 0.32% of Mississippi Power & Light Company's revenue.

21. The costs of retiring such limited facilities as protestants have in use in serving the loads involved (the substations belong to the respondents and are located on the transmission lines of protestants) would amount to an economic factor that is negligible in relation to the benefits to the public being served. Mr. J. T. Dudley made an on-the-ground measurement and inventory of all these items and estimated the total for Mississippi Power Company at $55.818 and for Mississippi Power & Light Company $4,000, total $59,818.

22. From all the evidence the Commission is of the opinion and finds that upon the generation and transmission system being constructed and put into operation petitioner will be able to carry on a sound business operation.

23. In the hearings protestants asserted that in order to establish proof of public convenience and necessity the petitioner should have made studies, estimates and forecasts covering its proposed operations for a longer period than it did. Its studies, estimates and forecasts covered a period ending July 1, 1970, which extended approximately nine years from the time the studies were made, including six years of actual operations. The protestants made all of their studies, estimates and forecasts for a period ending July 1, 1974, to include ten years of actual operations. Petitioner contended that it would need to make some addition to the production plant or otherwise arrange for an added source of power supply in about the year 1971, and some additions might be needed to the transmission system also at about that time, but that when its

studies were being made in 1960 and 1961 it was too early to be able to foresee, determine and reduce to actual plans and dollar expenditures those additions; and that such was not necessary in order to show public convenience and necessity for the initial construction for which a certificate is sought in this proceeding. Petitioner's studies and proof did include all additions of every character which it thinks will be necessary and expects to make up to July 1, 1970, and this includes major additions to be put into operation one year after the initial system commences operations. The initial system is planned to commence operations July 1, 1964, and the major additions July 1, 1965. Other minor additions, mostly to the general plant, are planned for subsequent years within the study period. The Commission is of the opinion and finds that the study period employed by petitioner was of sufficient duration for the purpose of determining whether or not public convenience and necessity exists for the issuance of the certificate sought by this proceeding for the initial construction and operation.

24. On the whole record herein the Commission is of the opinion and finds that the petitioner has sustained its petition by the evidence and that the public convenience and necessity requires and will require that a certificate of public convenience and necessity be issued to the petitioner authorizing it to construct, operate and maintain the generation and transmission facilities as fully described in the petition and in accordance with the prayer of the petition.

25. The Commission finds that proper process in the manner and for the time required by law was duly served on all parties in interest herein and that the Commission has full jurisdiction of the parties and the subject matter and has full power and authority to do all that is done herein.

It Is, Therefore, Ordered as follows:

(a) The petitioner, South Mississippi Electric Power Association, be and it is hereby granted a certificate of public convenience and necessity to construct, operate and maintain the following described facilities:

(1) A 65 megawatt electric generating station to be located approximately two miles northwest of the Village

of Moselle in Section 33, Township 7 North, Range 13 West, First Judicial District of Jones County, Mississippi, to consist of two steam driven turbo generators, each rated 22,000 kilowatts, and one gas driven turbo generator rated approximately 21,000 kilowatts, each generating unit and said station as a whole to be complete with all auxiliary equipment, machinery and facilities necessary or useful in the operation of said units and said station as a whole, including but not limited to roads, site preparation, parking areas, suitable building to house said station, yard structures, subsurface investigation, yard piping, wells, landscaping, water and fire system, steam generators, closed feed water heaters, deaerator heaters, demineralizing equipment, boiler feed pumps, fuel oil system, fuel handling and control equipment, combustion controls, power piping, stacks, condensers, intake structures, cooling towers, screens, circulating water pumps, circulating water piping, power wiring and insulation, step-up substation, oil circuit breakers, transformers, cranes and all other appropriate and related equipment and facilities of every kind and character suitable and proper to the completion of said generating station; and

(2) Approximately 392.6 miles of 69 KV transmission line (including acquisition of rights of way) and auxiliary equipment and facilities to provide a wholesale supply of electricity to the corporate members of petitioner named below at the delivery points indicated, to-wit:

1. To Singing River Electric Power Association with delivery points as follows:

Location	County
Richton	Perry
Hintonville	Perry
McLain	Greene
Lucedale	George

2. To Pearl River Valley Electric Power Association with delivery points as follows:

Location	County
Hattiesburg	Forrest

Location	County
Columbia	Marion
Bassfield	Jefferson Davis
Maxie	Forrest
Lumberton	Lamar

3. To Dixie Electric Power Association with delivery points as follows:

Location	County
Waynesboro-West	Wayne
Waynesboro-South	Wayne
Cleo	Jones
Macedonia	Forrest
Moselle-West	Jones
Laurel	Jones

4. To Southern Pine Electric Power Association with delivery points as follows:

Location	County
Collins	Covington
Waldrup	Jasper
Newton	Newton
Rawles Springs	Forrest
Taylorsville	Smith
Sylvarena	Smith
Prentiss	Jefferson Davis
Magee	Simpson
Pinola	Simpson
Puckett	Rankin
Morton	Scott

Said transmission lines shall follow generally the routes shown on the map Exhibit 7 in the evidence, a copy of which exhibit is attached hereto marked Exhibit "A" and made a part of this order.

All of such transmission line construction is to be of three No. 4/0 ACSR phase wires with a three-eighths inch H.S.S. shield wire, except for 16.5 miles (from the generat-

ing station to the Collins substation) of three 336.4 MCM ACSR phase wires with the same shield wire and 4.3 miles (tap from main line to Richton substation) of three No. 2/0 ACSR phase wires with the same shield wire.

(b) This order and the order this day issued and filed in Cause No. U-124 authorize the construction, operation and maintenance of identical facilities constituting but one generation and transmission system. If for any reason any court having authority superior to that of this Commission should upon any appeal or otherwise hold that petitioner did not qualify for a certificate of public convenience and necessity under Section 5(b) of the Act thereby rendering the order in that cause (U-124) ineffective, and removing from the grounds for this order in this cause (U-508) the ground of grandfather rights under Section 5(b) of the Act, nevertheless this order shall remain in full force and effect as being issued upon a finding and determination by the Commission that the public convenience and necessity requires and will require the issuance hereof and the construction, operation and maintenance of the aforesaid facilities, this finding and determination being in addition to and independent of grandfather rights under Section 5(b) of the Act.

(c) This order shall be in full force and effect on and after its date of issuance.

Adjudged and Ordered By the Public Service Commission of the State of Mississippi and under its official seal on this the 7th day of March, 1963.

O. B. MARSHALL,
Executive Secretary.

APPENDIX NO. 2

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI,
FIRST JUDICIAL DISTRICT

No. 71,398

MISSISSIPPI POWER COMPANY, ET AL., *Appellants,*

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, ET AL.,
Appellees

FINAL DECREE OF CHANCERY COURT DATED DECEMBER 22, 1967

Came on this day the appeals of Mississippi Power Company and Mississippi Power & Light Company vs. South Mississippi Electric Power Association, Et Al, in the above styled and numbered cause from an order of the Mississippi Public Service Commission issued January 4, 1967, in a proceeding bearing docket Number U-508 before that Commission, and the Court having heard and considered the same on the record of the hearing before the Mississippi Public Service Commission and on briefs and oral arguments of counsel, finds as follows:

(1) That the Commission's order of March 7, 1963, which was affirmed by our Supreme Court (183 So. 2d 163) is res adjudicata in this cause, and that the delay of the petitioners in constructing the generating plant and transmission lines described in the first petition was through no fault of petitioners but was solely caused by the appeal of the respondents thereon.

(2) That the Commission had before it a second petition of the petitioners to permit them to increase the capacity of the generating plant and transmission lines permitted under the first petition and that the issue for trial before the Commission on the second petition was whether public necessity and convenience required the increased facilities or any part thereof, due to increased needs and demands, if any, and increased or decreased supply, if any, occurring since the order on the original petition.

(3) That the Commission proceeded to try the issue but committed reversible error when it refused to permit the respondents to cross-examine petitioners' witnesses and refused to permit respondents' witnesses to testify in defense of the issue and refused to receive in evidence the exhibits offered in defense of the issue.

(4) That the order of the Commission should be affirmed as to continuing the order on the original petition in full force and effect, but should be reversed and remanded to the Commission for a new trial on the issue of whether or not public necessity and convenience requires the enlargement of the generating plant and transmission lines as prayed for by the petitioners and to hear all competent evidence offered by both sides or parties to determine the issue and that in so doing the Commission should follow the same procedure and rules of evidence that it followed on the hearing of the first or original petition on its merits, and in accordance with our Supreme Court's opinion affirming the original order, supra, and this decree.

(5) That upon a retrial of this issue before the Commission the respondents may offer evidence that the original facilities with the enlargement thereof are not a public necessity and convenience to show that the enlargement of the facilities is not a public necessity or convenience, but no further, as they cannot attack the facilities as first authorized.

(6) That upon a retrial of this issue before the Commission the question of material differences in rates is a part and parcel of the question of public necessity and convenience, and the public is entitled to obtain from the Commission the best and lowest efficient service and rates available.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the order of the Commission of January 4, 1967, be and the same is hereby affirmed as to continuing the order on the original petition in full force and effect, but that said order be and the same is hereby reversed and remanded

to the Commission for a new trial on the issue of whether or not public necessity and convenience requires the enlargement of the generating plant and transmission lines as prayed for by the petitioners.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the opinion of this Court herein be made a part of this order by reference, and a copy of said opinion is annexed to this order as Exhibit "1" and is made a part hereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all Court costs on this appeal be and the same are hereby taxed and assessed against the Appellees, for which process may issue.

ORDERED, ADJUDGED AND DECREED this the 22nd day of December, 1967.

Signed W. T. HORTON,
Chancellor.

(Exhibit "1" to Appendix No. 2)

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, STATE OF MISSISSIPPI

No. 71,398

MISSISSIPPI POWER COMPANY, ET AL., *Appellants,*

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, ET AL., *Appellees*

MEMO. OPINION

I concur with the Commission that the order which was affirmed by our Supreme Court on the first or original petition (183 So. 2d 163) is res adjudicata in this cause. I also concur with the Commission that the delay of the petitioners in constructing the generating plant and transmission lines described in the first petition was through no fault of the petitioners but was solely caused by the appeal of the respondents thereon.

The Commission had before it a second petition of the petitioners to permit them to increase the capacity of the generating plant and transmission lines permitted under the first petition.

It is my opinion that the issue for trial before the Commission on this second petition was whether public necessity and convenience required the increased facilities or any part thereof, due to increased needs and demands, if any, and increased or decreased supply, if any, occurring since the order on the original petition.

The Commission proceeded to try the issue, but it is my humble judgment that the Commission committed reversible error when it refused to permit the respondents to cross-examine petitioners' witnesses and refused to permit the respondents' witnesses to testify in defense of the issue and refused to receive in evidence the exhibits offered in defense of the issue.

Therefore the order of the Commission is affirmed as to continuing the order on the original petition in full force and effect, but it is reversed and remanded to the Com-

mission for a new trial on the issue of whether or not public necessity and convenience requires the enlargement of the generating plant and transmission lines as prayed for by the petitioners, and to hear all competent evidence offered by both sides or parties to determine the issue. That is to say, follow the same procedure and rules of evidence they followed on a hearing of the first or original petition on its merits, and in accordance with our Supreme Court's opinion affirming the original order, supra, and this opinion.

I hold as a matter of law that the respondents may offer evidence that the original facilities with the enlargement thereof are not a public necessity and convenience to show that the enlargement of the facilities is not a public necessity or convenience, but no further, as they cannot attack the facilities as first authorized.

It is my humble judgment that the question of material differences in rates is a part and parcel of the question of public necessity and convenience and the public is entitled to obtain from the Commission the best and lowest efficient service and rates available.

I want to thank all the attorneys on both sides for their most helpful oral arguments and briefs.

You may prepare and present a decree according to this opinion.

Respectfully submitted,

W. T. Horton,
Chancellor.

APPENDIX NO. 3

IN THE SUPREME COURT OF MISSISSIPPI

No. 45,065

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION,

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

OPINION OF SUPREME COURT OF MISSISSIPPI, RENDERED JUNE 10, 1968

INZER, Justice:

This is an appeal by South Mississippi Electric Power Association and four of its member associations from a decree of the Chancery Court of the First Judicial District of Hinds County, wherein that court affirmed in part, reversed in part and remanded an order of the Mississippi Public Service Commission which had granted to appellant, South Mississippi Electric Power Association, an amended certificate to construct enlarged facilities for supplying four of its member associations with wholesale electricity.

This is the third appearance of this case before this Court. Its history and the description of the parties involved are set out in *Mississippi Power Company* v. *South Mississippi Electric Power Association,* 254 Miss. 754, 183 So. 163 (1966), wherein we affirmed an order of the Mississippi Public Service Commission granting to appellant a certificate of public convenience and necessity to build facilities to generate and supply wholesale electricity to four of its member associations. This certificate was granted on March 7, 1963, as a result of an application filed with the commission on March 31, 1960. Appellees appealed from that order of the commission and obtained a "stay order" which prevented appellant from beginning the construction authorized by the certificate. On July 20, 1965, while the former appeal was pending, appellant filed with the commission a petition to amend its certificate. It asked to enlarge the capacity of its system to properly meet the increased supply demands of the members it was authorized to serve. After this application was filed, appellees filed a

plea in bar in this Court setting up that the application was an admission that the facilities proposed and authorized for construction were inadequate and thus rendered the appeal moot. We overruled the plea in bar.

The petition to amend alleged that the delay incident to appeals necessitated enlarging the system. It was alleged that inasmuch as the delay had been suffered there were changes that could be made in the generating facilities for the purpose of efficiency and economy. It asked that its certificate be amended to authorize it to install three fifty megawatt units in its generating station at Moselle and one fourteen megawatt unit at Benndale on the periphery of the system, rather than the three twenty-two megawatt units originally proposed. It also requested that the transmission system that it was authorized to build be altered so as to enable it to construct about 800 miles of 60 KV transmission lines instead of the 392.6 miles originally proposed. The petition alleged that this increase in mileage was mostly due to the closing of loops in the lines as originally proposed. It was also requested that additional delivery points be established in order that it might properly supply electricity to the member associations it had heretofore been authorized to serve.

Appellees protested the granting of the amended certificate and contended among other things that the facilities and generating plant described in the petition to amend was not a modification of the facilities and plant authorized by the order of March 7, 1963, but instead was a new and different plan and that it was in effect an original application and an abandonment of the certificate granted. As a consequence thereof appellees argue that appellant was required by the Public Utility Act of 1956 to prove, as it did in the original petition, that public convenience and necessity require construction of any facilities by appellant. Singing River, Dixie, Southern Pine and Pearl River Valley electric power associations filed a petition to intervene and they were allowed to do so. They joined in the request that the amended application be granted. The commission confined the issue to be tried on the amended application to the question of whether public convenience and necessity

required the construction of the enlarged system rather than the system originally authorized. It rejected the evidence offered by appellees designed to show that public convenience and necessity did not require the construction of any facilities by the appellant. It also refused to allow appellees to cross examine appellant's witnesses on this issue. The commission held that the testimony offered was immaterial to the issue before it at that time. Appellees were allowed to proffer the evidence rejected and it is in the record before us. The hearing was extended over a period of several weeks and resulted in a rather lengthy record, which we have carefully reviewed.

On January 4, 1967, the commission entered an order sustaining the petition and granted an amended certificate authorizing appellant to construct the enlarged system. The order of the commission deals with all the questions involved in this appeal but due to its length we will only set out herein such portions as we deem appropriate.

The commission found from the evidence that:

> 31. From all of the evidence, the Commission is of the opinion and finds that the granting of an order herein amending the certificate of public convenience and necessity heretofore granted to Petitioner by the Order of March 7, 1963, in manner and form as sought by the Petition to Amend would materially benefit the Petitioner, the four corporate members of Petitioner to be supplied with power at wholesale by Petitioner and that segment of the public served by said corporate members of Petitioner; this would be particularly true in that Petitioner would thereby be enabled to build its system up to the capacity presently required in a more orderly way with a substantially smaller capital investment and would obtain a more efficient operation than would be the case if it approached the problem by building the system as originally certificated and making additions thereto.
>
> 32. On the whole record therein, the Commission is of the opinion and finds that the Petitioner has sustained its Petition to Amend its certificate of public convenience and necessity heretofore granted on March

7, 1963, by the evidence and that the public convenience and necessity require and will require that the Commission issue an order herein amending said certificate of public convenience and necessity in manner and form as sought and prayed for in the Petition to amend, as amended.

Appellees appealed to the Chancery Court of the First Judicial District of Hinds County. The chancellor, after reviewing the record, wrote a memorandum opinion wherein he concurred with the commission in its finding that the order as affirmed in the *Mississippi Power Company, supra,* was res judicata in this cause. He also concurred with the commission in its finding that the delay of the appellant in constructing the authorized generating plant and transmission lines was through no fault of appellant, but was solely caused by appellee's appeal. The chancellor then stated:

> It is my opinion that the issue for trial before the Commission on this second petition was whether public necessity and convenience required the increased facilities or any part thereof, due to increased needs and demands, if any, and increased or decreased supply, if any, occurring since the order on the original petition.
>
> The Commission proceeded to try the issue, but it is my humble judgment that the Commission committed reversible error when it refused to permit the respondents to cross examine petitioner's witnesses and refused to permit the respondents' witnesses to testify in defense of the issue and refused to receive in evidence the exhibits offered in defense of the issue.
>
> Therefore the order of the Commission is affirmed as to continuing the order on the original petition in full force and effect, but it is reversed and remanded to the Commission for a new trial on the issue of whether or not public necessity and convenience requires the enlargement of the generating plant and transmission lines as prayed for by the petitioners, and to hear all competent evidence offered by both sides or parties to determine the issue. That is to say,

follow the same procedure and rules of evidence they followed on a hearing of the first or original petition on its merits, and in accordance with our Supreme Court's opinion affirming the original order, supra, and this opinion.

I hold as a matter of law that the respondents may offer evidence that the original facilities with the enlargement thereof are not a public necessity and convenience, but no further, as they cannot attack the facilities as first authorized.

A decree was entered in accordance with the chancellor's opinion and from that decree this appeal is prosecuted. There is no cross appeal.

The principal question for determination is whether the chancellor was correct in holding that the commission was in error in rejecting the testimony offered by appellees and in limiting the cross examination of appellant's witnesses.

A determination of this question depends upon the scope of the issue to be tried by the commission on hearing the petition for an amended certificate. Appellant urges that the only issue to be tried by the commission was whether public convenience and necessity required the construction of the enlarged system instead of the facilities authorized in the original certificate. It is their contention that the commission properly limited the testimony to this issue and that the testimony offered by appellees was incompetent and irrelevant to the issue. On the other hand appellee urged that the chancellor correctly held that the commission was in error in rejecting the testimony offered by them to show that public convenience and necessity did not require the construction of any facilities by the appellant. In discussing this issue, the commission said:

23. Protestants made no serious effort to show that it would be in the public interest for Petitioner to build its system as originally certificated and add onto it rather than building the modified system with increased capacity as sought by the Petition. Rather Protestants seemed to advance the theory that since Petitioner is seeking permission to increase the capacity of its sys-

tem in the manner set forth in the Petition, it has "abandoned" its original system, now proposes to build a "different" system, and it is therefore required to again prove public convenience and necessity for entering the generation and transmission field; and under this theory Protestants sought to bring up and litigate all over again the basic issues involved in the original proceeding.

24. In the opinion of the Commission, those issues have been heretofore fully litigated and decided in favor of Petitioner and against Protestants; and that determination has been affirmed by the highest Court of our State. For all purposes of this proceeding, Petitioner is in the opinion of the Commission already in business in the generation and transmission field. If this view were not adopted, it would be easy to see how a Petitioner might file its petition, prove its case, be awarded a certificate to enter the field, be carried up on appeals by Protestants, win in the courts, find that its loads had increased in the interim; start all over again by petition to modify its facilities to provide for the increased loads (the Commission judicially knows loads have been for a long time increasing at the rate which doubles them at intervals of from seven to ten years) only to be met again by Protestants (who may have, in the meantime mended their ways and better prepared themselves to protest) and if fortunate enough to win again, again start the journey on appeals; and so on *ad infinitum*; so that even the most deserving Petitioner, under the most impelling circumstances insofar as the public interest is concerned, might find itself continually applying for certificates but never able to enter the field. This sort of situation could approach the making of some utilities "captive customers" of others, a thing frowned upon by our Supreme Court in this very case (*Mississippi Power Co., et al.* v. *South Mississippi Electric Power Association, et al.*, 123 So. 2d 163, 170); and certainly such a situation would, for obvious reasons (suppression of competition, protracted litigation, unncessary expense, etc.) be inimicable to the public interest.

It appears that the commission and the chancellor placed different interpretations on what we said in our former opinion relative to the plea in bar. We said:

> We are of the opinion that the issue raised by the plea in bar is not well taken as more than five years had elapsed from the time of filing the original application for the generating plant and the July 20, 1965, application seeking to enlarge it. The electric industry is fluid; demands for service are constantly fluctuating. These demands are closely related to economic or business trends, the prosperity or lack of it on the part of the consuming public, and many other factors; the daily, weekly, monthly and yearly electrical requirements, though they can be reasonably estimated, are constantly changing. We conclude, as did the Supreme Court of Kentucky, in *Kentucky Utilities Co.* v. *Public Service Commission, Ky.* 252 S. W. 2d 885 (1952), that "The Public Service Commission necessarily must base its decision and actions on the economic conditions existing at the time a case is before it, and it is not in the public interest that a case be prolonged indefinitely by allowing a reconsideration whenever there is a fluctuation in price levels."
>
> The issues raised by the plea in bar was not before the commission at the time of the hearing. Without deciding that the same is properly before us, we hold that the conditions existing in 1965 were not necessarily the conditions existing in 1960, the year in which the forecasts were made as to the electrical needs, and for this reason the plea in bar should be overruled and this appeal restricted to the economic conditions existing at the time the case was before the commission. The issues raised by the amended application are issues to be determined by the commission when properly presented to it. 254 Miss. at 766, 767; 183 So. 2d at 166, 167.

It is apparent that we held that the filing of the petition for an amended certificate while the appeal was pending did not constitute an abandonment of the facilities author-

ized, so as to render the appeal moot. We noted that more than five years had elapsed since the filing of the original application until the time the amended certificate was filed and that demands for service in the electrical industry were constantly fluctuating. We stated that the issues raised by the amended application were to be determined by the commission. We did not attempt to define the scope of the commission's inquiry on hearing the petition for an amended application. We certainly did not hold that the commission should again be required to determine whether public convenience and necessity required the construction of any generating facilities by appellant. We affirmed the granting of the certificate authorizing construction of the facilities proposed in the original application and left to the determination of the commission whether the certificate should be amended.

Although counsel in their excellent and exhaustive briefs cite numerous decisions by this Court and courts of other states, they do not cite any cases dealing with a factual situation similar to the one here, nor have we found any.

When we analyze the situation with which the commission was confronted, we find that it properly limited the issue to the question of whether public convenience and necessity required the construction of the enlarged facilities requested in the amended application rather than the facilities authorized in its order of March 7, 1963. After we had affirmed its action in granting the certificate of public convenience and necessity to appellant to construct the authorized facilities and the Supreme Court of the United States had refused to grant certiorari, neither the commission nor anyone else could prevent appellant from constructing those facilities and delivering the electricity generated to its member associations at the authorized delivery points. So actually all the commission could legally do was to either grant or refuse to grant the amended certificate. It could not take away appellant's right to construct the facilities that it had authorized; it could not hold that by delay, appellant had abandoned its right to construct those facilities because appellant had been prevented from building them by the "stay order" granted at the appellee's request. If it had denied the petition, appel-

lant could have proceeded to construct the authorized facilities and then applied for an amended certificate to enlarge them. The proof shows that the facilities proposed in the amended application can be constructed for far less money than it would cost to construct the original facilities and then to add to them the necessary generating units and transmission lines to properly serve the needs of the four associations with which it holds contracts to supply wholesale electricity. Under these circumstances the proof offered by appellee was not relevant to the issue and the commission properly rejected it. Neither did it unduly restrict appellee's right to cross examine appellant's witnesses.

Appellee's contention that the facilities proposed in the amended application are new and so different as to amount to an original application is without merit. The enlarged plant is to be constructed at the same location as the plant originally authorized. Its principal difference is that it will be capable of generating more electricity. It will still be a plant for the generating of electricity. Appellant was authorized to construct certain transmission lines by the original certificate to serve its member associations at certain delivery points. The amended application sought authority to build more miles of the same type transmission lines and to delivery electricity at more delivery points, but these lines and delivery points will serve the same associations it was authorized to serve in the original application except for one delivery point at Leakesville. Though the commission found this delivery point was not included in the original certificate, it was shown by the undisputed evidence that in the original proceeding appellant had proposed to pick up this delivery point on or about July 1, 1965, being one year after the original start-up. This point is now served by Mississippi Power Company, but the commission found that Mississippi Power Company directed no objection to the picking up of this delivery point as such. The commission found that it is an intermediate delivery point between Lucedale and Rocky Creek sub-stations in the extreme southeast portion of appellant's proposed transmission system and the State Line sub-station located thirty miles or more to the north, and that

without this delivery point there would be no intermediate delivery point on this line. The commission found that there was sufficient evidence to establish that public convenience and necessity required and will require that this delivery point be included in appellant's overall system.

While it is true appellant had not at the time of the hearing of the amended application or at any other time generated any electricity or built any transmission lines, it held a certificate which authorized it to do so and we are of the opinion that for all practical purposes insofar as the hearing before the commission is concerned that they were in the same position as any other public utility seeking to increase its facilities to properly serve the needs of those it was authorized to serve.

The granting by the commission of the original and amended certificate of public convenience and necessity to South Mississippi Electric Power Association to generate and transmit electricity to its four member associations, amounts to no more than authorizing these associations to generate their own electricity. It is as we said in *Mississippi Power Company, supra*:

> It is well to keep in mind that petitioner is a federation of nine power associations, respondents being four of them, so in essence petitioner is a corporation through which the associations will generate their own power as they have the statutory right to do under the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, Mississippi Code Annotated section 5463 et seq. (1956). 254 Miss. at 773; 180 So. 2d at 170.

We hold that the order of the Commission granting the amended certificate of convenience and necessity authorizing appellant to construct the enlarged facilities is supported by substantial evidence and is in keeping with the law. The Chancery Court was in error in reversing the order of the Commission and that part of its decree is reversed and judgment entered here reinstating and affirming the order of the Commission.

REVERSED AND JUDGMENT HERE FOR APPELLANT.

ALL JUSTICES CONCUR, EXCEPT BRADY WHO TOOK NO PART.

APPENDIX NO. 4

IN THE SPREME COURT OF MISSISSIPPI

Monday, June 10, 1968, Court Sitting

No. 45,065

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION,

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

JUDGEMENT OF SUPREME COURT OF MISSISSIPPI, DATED JUNE 10, 1968

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Hinds County, First District and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 22nd day of December, 1967— be and the same is hereby reversed and decree is entered here for the appellant. It is therefore ordered and adjudged and decreed that the said Chancery Court was in error in reversing the order of the Commission and that part of its decree is reversed and decree is entered here reinstating and affirming the order of the Commission. It is further ordered and adjudged and decreed that the appellant do have and recover of and from the appellees all of the costs in this Court and in the Court below to be taxed for which let proper process issue.

MINUTE BOOK "Bo" Page 367

STATE OF MISSISSIPPI,
HINDS COUNTY:

I, Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the above is a true and correct copy of the judgment as it appears on file in Minute Book "BO" Page 367 in this office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 5th day of September A. D., 1968.

JULIA H. KENDRICK,
Clerk Supreme Court

APPENDIX NO. 5

IN THE SUPREME COURT OF MISSISSIPPI

Monday, July 8, 1968, Court Sitting

No. 45,065

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION,

vs.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL.

ORDER OF SUPREME COURT OF MISSISSIPPI DENYING REHEARING, DATED JULY 8, 1968

This cause this day came on to be heard on the petition for a rehearing of the appellees filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition be and the same is hereby denied.

MINUTE BOOK "Bo" Page 373

STATE OF MISSISSIPPI,
HINDS COUNTY:

I, Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the above is a true and correct copy of the judgment as it appears on file in Minute Book "BO" Page 373 in this office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 9th day of September A.D., 1968.

JULIA H. KENDRICK,
Clerk Supreme Court

APPENDIX NO. 6

Pertinent Provisions of Chapter 372, Laws of Mississippi of 1956

Pertinent Sections of the Mississippi Public Utility Act

§ 7716-01. Definitions.

A. The term "corporation," when used in this act, includes a private or public corporation, a municipality, an association, a joint stock association or a business trust.

B. The term "person," when used in this act, includes a natural person, a partnership of two (2) or more persons having a joint or common interest, a co-operative, non-profit, limited dividend or mutual association, a corporation as hereinbefore defined, or any other legal entity.

C. The term "municipality," when used in this act, includes any incorporated city, town or village.

D. The term "public utility," when used in this act, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for:

(1) The generation, manufacture, transmission or distribution of electricity to or for the public for compensation.

(2) The transmission, sale, sale for resale, or distribution of natural, artificial, or mixed natural and artificial gas to the public for compensation by means of transportation, transmission, or distribution facilities and equipment located within this state, but shall not include the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, nor the distribution or sale of liquefied petroleum gas.

(3) The transmission, conveyance or reception of any message over wire, or by radio, or otherwise, of writing, signs, signals, pictures and sounds of all kinds by or for the public, where such service is offered to the public for compensation; and the furnishing, or the furnishing and maintenance, of equipment or facilities to the public, for

compensation, for use as a private communications system or part thereof; provided, that no persons or corporations not otherwise a public utility within the meaning of this act shall be deemed such solely because of engaging in this state in the furnishing, for private use as last aforementioned; and provided further that nothing in this act shall be construed to apply to television stations, radio stations or community television antenna services.

(4) The transmission, distribution, sale or resale of water to the public for compensation.

(5) The term "public utility" shall not include any person not otherwise a public utility, who furnishes the services or commodity described in sections 1 D (1), 1 D (2), 1 D (3) and 1 D (4) [this section] of this act only to himself, his employees or tenants as an incident of such employee service or tenancy, and provided such services are not sold or resold to such tenants or employees on a metered or consumption basis.

E. The term "rate," when used in this act, means and includes every compensation, charge, fare, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility for any service, product or commodity described in this section, offered by it to the public, and any rules, regulations, practices or contracts relating to any such compensation, charge, fare, toll, rental or classification; except, however, the term "rate" shall not include charges for electrical current furnished, delivered or sold by one public utility to another for resale.

F. A public utility's business other than of the character defined in subparagraphs (1) to (4) of subsection D of this section is not subject to the provisions of this act.

G. The word "commission," when used in this act, shall refer to the Public Service Commission of the State of Mississippi as now existing, unless otherwise indicated.

H. Any public utility as defined in paragraph D above, owned or operated by a municipality shall not be subject to the provisions of this act, except as to extension of utilities greater than one mile outside of corporate boundaries after the effective date of this act.

§ 7716–04. General jurisdiction and powers.

Subject to the limitations imposed in this act, and in accordance with the provisions hereof the commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities as herein defined, except and provided, however, that the commission shall not have jurisdiction over the production and gathering of natural gas, or the sale of natural gas in or within the vicinity of the field where produced, nor over the facilities and equipment utilized in any such operations including but not limited to such facilities as separators, scrubbers, and gasoline plants of all types. Provided, further, the commission shall not have jurisdiction to regulate the rates for the following sale of commodities or services: (1) sales of gas, water or electricity by municipalities to such persons as said municipalities are authorized by law to serve; (2) sales of gas or electricity by co-operative gas or electric power association to the members thereof as consumers, except as provided by section 5 [§7716–05], paragraphs (d) and (e) where service is rendered in a municipality.

§ 7716–05. Certificate of public convenience and necessity; when required.

No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D (3) of section 1 [§ 7716–01], of this act, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the

vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by this act which has heretofore been under the jurisdiction of the Mississippi Public Service Commission shall, upon application within six (6) months of the effective date of this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or maps on file with the Mississippi Public Service Commission on the effective date of this act.

(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facilities outside of municipalities under such general rules as will promote

the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in section 1 D (1) and 1 D (2) [§ 7716-01] and in the case of a utility defined in 1 D (3) [§ 7716-01] the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective

date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates, or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise granted by the municipality; provided, however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein

provided. Applicants for certificates of convenience and necessity as provided for under section 5 [this section] hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with or repugnant to the exclusive jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided, however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

In the event the commission shall rule that a franchise is being arbitrarily withheld and shall issue a certificate of necessity as hereinabove mentioned, the utility obtaining said certificate of convenience and necessity shall not be required to pay to said municipality the two per cent (2%) hereinabove provided until such a franchise has been granted to said utility.

In the case of a public utility as defined in section 1 D (3) [§ 7716-01] which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on the effective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided.

§ 7716-14. Hearings.

The commission may, in addition to the hearing specially provided by this act, conduct such other hearings as may

be required in the administration of the powers and duties conferred upon it by this act.

The commission shall fix the time and place of hearings, if any is required, and shall serve notice thereof, not less than twenty (20) days before the time set for such hearings, unless the commission shall find that public convenience or necessity requires that such hearings be held at an earlier date. The commission may dismiss any complaint without a hearing if in its opinion a hearing is not necessary in the public interest or for the protection of substantial rights. Notice of all such hearings shall be given the persons interested therein by mailing such notice to each public utility which may be affected by any order resulting therefrom and by publication in a newspaper of general circulation published in Jackson, Mississippi.

At the time fixed for any hearing before the commission, or the time to which the same may have been continued, the complainant and the person complained of shall be entitled in person or by attorney to be heard and to introduce evidence.

§ 7716-23. Alteration of orders.

The commission may at any time, after notice, and after opportunity to be heard as provided in section 14 [§ 7716-14] of this act, rescind, or amend any order or decision made by it. Any order rescinding, or amending a prior order or decision shall, when served upon the utility affected and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders or decisions, but no such order shall affect the legality or validity of any acts done by said utility before service upon it of the notice of such change.

§ 7716-24. Record of proceedings.

A full and complete record shall be kept of all proceedings had before the commission or any commissioner or any formal hearing, and all testimony shall be taken down by a reporter appointed by the commission, whose qualifications and compensation shall be the same as now provided by law for the circuit and chancery court reporters.

§ 7716-25. Rehearing.

After an order or decision has been made by the commission, any party to the proceedings may, within thirty (30) days after the entry of the order or decision, apply for a rehearing in respect of any matters determined in said proceedings and specified in the application for rehearing, and the commission may grant and hold such rehearings on such matters.

The filing of an application for rehearing shall not stay or suspend the effective date of any commission order or the obligation of any person to comply in all respects with such order unless the commission shall, in the exercise of its discretion, stay, suspend or modify such order. Any party to the proceedings shall be entitled to a stay of the order, as a matter of right, upon filing with the commission a bond payable to the State of Mississippi in such amount and with sufficient surety, both as determined by the commission, to insure the prompt payment of any damages or refunds to the party or persons entitled thereto, if the order shall, at the conclusion of any subsequent proceedings, become effective.

The commission shall either grant or refuse an application for rehearing within twenty (20) days after the date of application therefor; and a failure by the commission to act upon such application within that period shall be deemed refusal thereof. If the application is granted, the commission shall enter a new order after the rehearing shall have been concluded, which shall become effective ten (10) days after such order is entered, unless otherwise provided by the commission for reasonable cause.

§ 7716-26. Review.

(a) In addition to other remedies now available at law or in equity any party aggrieved by any final finding, order, or judgment of the commission, shall have the right, regardless of the amount involved, of appeal to the Chancery Court, First Judicial District of Hinds County, Mississippi. If an application for rehearing has been filed, an appeal must be filed within thirty (30) days after the application for rehearing has been refused or deemed re-

fused because of the commission's failure to act thereon within the time specified in the preceding section or, if the application is granted, within thirty (30) days after the rendition of the decision on rehearing. If an application for rehearing has not been filed, an appeal must be filed within thirty (30) days after the entry of the commission's order. Every appeal shall state briefly the nature of the proceedings before the commission, and shall specify the order complained of. Any person whose rights may be directly affected by said appeal may appear and become a party, or the court may upon proper notice order any person to be joined as a party.

(b) Upon the filing of an appeal the clerk of the chancery court shall serve notice thereof upon the commission, whereupon the commission shall, within sixty (60) days (or within such additional time as the court may for cause allow) from the service of such notice, certify to the chancery court the record in the case, which record shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided however, that the parties and the commission may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

(c) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record and evidence transferred.

(d) The court may hear and dispose of the appeal in term time or vacation and the court may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may be; but in case the order is wholly or partly vacated the court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the court's order as, in the opinion of the court, justice may require. The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.

APPENDIX NO. 7

MISSISSIPPI POWER COMPANY ET AL., *Appellants,*

v.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION ET AL., *Appellees.*

No. 43693

Supreme Court of Mississippi

February 14, 1966

OPINION OF MISSISSIPPI SUPREME COURT RENDERED
February 14, 1966

• • • • •

PATTERSON, Justice.

This is an appeal by Mississippi Power Company and Mississippi Power & Light Company from a final decree of the Chancery Court of Hinds County affirming an order of the Public Service Commission which granted a certificate of public convenience and necessity to South Mississippi Electric Power Association. The order authorized construction and operation of a steam electric generating plant in Jones County and an electric transmission system necessary to its operation in southeast Mississippi.[1] The purpose of such facility and transmission system is to provide a bulk supply of electricity to four of the corporate members of South Mississippi Electric Power Association. We affirm.

South Mississippi Electric Power Association, hereinafter referred to as petitioner, is a Mississippi corporation organized and operated under the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, Missis-

[1] An electric generating facility of 65-megawatt nameplate rating to be located on a 55-acre site in Jones County, Mississippi, and approximately 392.6 miles of transmission lines extending out from the facility to 26 delivery points of four electric power associations in 17 counties of southeast Mississippi. It is estimated these facilities will cost in excess of $15,000,000.

sippi Code Annotated section 5463 et seq. (1956). It has authority to engage in all types of utility operations, including the generation and transmission of electric energy. It is composed of nine corporate members, each of which is an electric power association organized and operated under the Electric Power Association Act supra and each of which is engaged in the transmission, distribution and sale of electricity to the public. The corporate members of the petitioner are: Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Power Association, Pearl River Valley Electric Power Association, Coast Electric Power Association, Magnolia Electric Power Association, Southwest Mississippi Electric Power Association, Capital Electric Power Association, and East Mississippi Electric Power Association. Four of these associations, Singing River, Dixie, Southern Pine, and Pearl River Valley, were made respondents to this petition by order of the commission. Though designated as respondents, their position in essence is the same as that of the petitioner as each confesses the petition.

Mississippi Power Company, one of the two protestants, is a foreign corporation authorized to do business in this state. It is a private utility engaged in the business of generating, transmitting, and distributing electricity in the southeastern part of the state.

Mississippi Power & Light Company, the other protestant, was a foreign corporation organized and operated under the laws of Florida, but it is now chartered in Mississippi. It is also a private corporate utility engaged in the business of generating, transmitting and distributing electricity. Its service area is roughly the western part of the state.

These two utilities, Mississippi Power & Light Company and Mississippi Power Company, are hereinafter referred to as the protestants except when specific reference is made to one or the other.

At the present time the electric power associations, individually, purchase their electric power supply from either one or the other of the protestants. These sales by the

protestants to the individual associations are authorized by "grandfather certificates" granted to the protestants by the Public Service Commission under the authority of Mississippi Code Annotated section 7716-05(b) (1956). These grandfather certificates were granted to the protestants as they sold bulk or wholesale supplies of electric energy to these delivery points at the time of the act. The certificate to Mississippi Power & Light Company (Commission Docket U-44) authorizes it to serve a specified delivery point of Southern Pine. The certificate to Mississippi Power Company (Commission Docket U-99) authorizes it to sell electric energy to the power associations at specified delivery points. However, this certificate is subject to the following restrictive language in the commission's order: "The commission is not hereby adjudicating the legal effect of the certificate herein granted as to service to the aforesaid associations, nor is the commission determining in this proceeding that the certificate herein granted binds said associations to continue receiving such service." At the time this suit was instituted in 1960 these sales to the associations comprised .32% of the total sales of Mississippi Power & Light Company and 4.14% of the total sales of Mississippi Power Company.

The petitioner's application for authority to construct a generating plant and transmission system was filed March 31, 1960, before the commission. The order awarding the certificate of public convenience and necessity was entered on March 7, 1963, upon the completion of a hearing which comprised 78 days. The voluminous 82-volume record in this case contains 478 exhibits and is over 12,000 pages in length. The various motions, pleas, and appeals, including one interlocutory appeal to this Court, are so numerous and lengthy that a discussion of them, which would not reach the merits of the suit, would serve no useful purpose.

Subsequent to the perfection of this appeal, petitioner, on July 20, 1965, filed a petition with the Public Service Commission to amend the certificate theretofore granted to it. Petitioner is now seeking, by this amended petition, to enlarge the facility specified in the certificate. The pro-

testants thereupon filed a plea in bar in this Court alleging in substance that this was an admission on the part of the petitioner that the 65-megawatt generating facility, the subject of this suit, is inadequate, would in fact never be constructed, and therefore, by such admission the cause is rendered moot.

The protestants contend, in addition to the plea in bar, that the order of the commission is not supported by substantial and competent evidence, that the order of the commission violates the "existing facility" rule in that it authorizes an unwarranted duplication of service presently being rendered by protestants. They contend that the order of the commission impairs previously existing certificate rights of the protestants and they contend that under either the "existing facility" rule or the "existing certificate right" they were not accorded the opportunity to correct whatever inadequacy of service there existed as is contemplated by Mississippi Code Annotated section 7716-05 (f) (1956), and they were thus deprived of valuable rights without due process of law; and finally, they contend that the commission's order should be reversed as it was predicated upon the operation of facilities in violation of law.

[1] We are of the opinion that the issue raised by the plea in bar is not well taken as more than five years had elapsed from the time of filing the original application for the generating plant and the July 20, 1965 application seeking to enlarge it. The electric industry is fluid; demands for service are constantly fluctuating. These demands are closely related to economic or business trends, the prosperity or lack of it on the part of the consuming public, and many other factors; the daily, weekly, monthly and yearly electrical requirements, though they can be reasonably estimated, are constantly changing. We conclude, as did the Supreme Court of Kentucky, in Kentucky Utilities Co. v. Public Service Commission, Ky., 252 S.W. 2d 885 (1952) that: "The Public Service Commission necessarily must base its decision and actions on the economic conditions existing at the time a case is before it, and it is not in the public interest that a case be prolonged indefinitely by allowing a reconsideration whenever there

is a fluctuation in price levels." The issue raised by the plea in bar was not before the commission at the time of the hearing. Without deciding that the same is properly before us, we hold that the conditions existing in 1965 were not necessarily the conditions existing in 1960, the year in which the forecasts were made as to the electrical needs, and for this reason the plea in bar should be overruled and this appeal restricted to the economic conditions existing at the time the case was before the commission. The issues raised by the amended application are issues to be determined by the commission when properly presented to it.

[2, 3] The protestants next urge that there is no substantial evidence to support the order of the commission. The "substantial evidence" rule is well established in our jurisprudence both by statute and case law. Mississippi Code Annotated section 7716-26(d) (1956) in reference to orders of the Public Service Commission states in part:

> * * * The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.

We find the following statement of the rule in the case of East Mississippi Electric Power Ass'n v. Mississippi Power Co., 251 Miss. 310, 314, 169 So.2d 473, 474 (1964):

> The action of the Commission in granting a certificate cannot be overturned if it is supported by substantial evidence, and is not arbitrary or capricious, or beyond its power to make, and does not violate some constitutional right.

See also Mississippi Power Co. v. East Mississippi Electric Power Ass'n, 249 Miss. 869, 164 So.2d 479 (1964) and Mississippi Power & Light Co. v. Blake, 236 Miss. 207, 109 So.2d 657 (1959) and numerous other Mississippi cases to

the same effect. After a careful reading of this record we are of the opinion there was substantial evidence based upon competent testimony to support the findings of the commission and that its order was not arbitrary or capricious. We conclude, therefore, that this assignment of error is not well taken.

[4] The protestants next rely on the "existing facility" rule, sometimes in this state called the Tri-State Transit rule. This rule as stated in Tri-State Transit Co. of Louisiana, Inc. v. Dixie Greyhound Lines, Inc., 197 Miss. 37, 48, 19 So.2d 441, 444 (1944) is as follows:

> • • • [T]hat a certificate should not be granted where there is existing adequate service over the route applied for, and, if inadequate, unless the existing carrier has been given an opportunity to furnish such additional service as may be required.

This rule has been applied to the issuance of certificates to public electric utilities under Mississippi Laws ch. 372, § 5 (1956) in Capital Electric Power Ass'n v. Mississippi Power & Light Co., 240 Miss. 139, 125 So.2d 739 (1961), though in fact the "existing facility" statute (Miss. Code Ann. § 7642) is a part of the Motor Carrier Act. In Keith v. Bay Springs Tel. Co., 251 Miss. 106, 114, 168 So.2d 728, 730, 732 (1964), in applying the rule to radio telephones we held:

> However, the existing facility rule does not apply unless the services and facilities to be rendered by the new certificate are duplicating and result in waste. Section 5(c) of the Public Utility Act reflects an intent to "prevent unnecessary and uneconomic duplication of such facilities as between two" utilities. See also § 5(f). The rule is a limitation upon the Commission's power to issue certificates, but it is relevant for the purpose principally of avoiding wasteful duplication of the existing utility service. • • • In short, the existing facility rule, developed under the Motor Carrier Regulatory Act, has been applied to an electric utility under the 1956 act. But it should not be used

> arbitrarily or inflexibly. The Commission is given the power to determine "that the present or future public convenience and necessity require or will require the operation of such equipment or facility." * * * This is essentially the determination of a matter of policy, namely, which utility in the opinion of the agency will best serve the public convenience, necessity and welfare.

The Court in Keith supra quoted with approval the consideration given such problem in Utah Light & Traction Co. v. Public Service Commission, 101 Utah 99, 118 P.2d 683, 690 (1941), wherein it stated:

> Of course the public interest may well be subserved by preventing waste. * * * But the waste must be such as would injure the public or interfere with its interests, growth and development. It must not be a prevention of waste carried to the extreme where it prevents or interferes with progress in equipment or methods or ways of serving the public. And the determination as to whether waste would result, or whether the waste which did result would be so against the public welfare and interest that it should be prevented, are questions for the commission to determine.

The commission in its detailed and excellent order [2] found that there was no uneconomic or wasteful duplication though it did find, in a few instances, the transmission lines of petitioner's proposed system would parallel those of the protestants already in place. Their finding in this and other regards is as follows:

> 12. For a number of years there has been a constant need for additional generation and transmission facilities in this state and this need will continue to grow.

[2] The Public Service Commission's order deals with every facet of this case in an able and lucid manner, not an easy task in view of the scientific language of the electrical engineers and of the industry. This order would be incorporated in full in this opinion, but we refrain from doing so due to its necessary length.

The need for more generating capacity is greater than the capacity of the facilities which petitioner proposes to construct and operate. This is true despite the splendid interconnections which protestants have with other sources and systems within their own respective groups (Mississippi Power Company is a member of the Southern Company group and Mississippi Power & Light Company is a member of the Middle (South) Utilities, Inc. group) and also with systems outside these groups. There is sufficient evidence to sustain this finding. It is enough to mention that: Mississippi Power Company has found it necessary to begin building immediately for operation in 1965 and 1966 approximately 200,000 to 240,000 KW of generating capacity and a substantial quantity of transmission facilities, not only to handle this particular output but to strengthen its transmission system otherwise; leaving aside the benefits of interconnections, both protestants have already exceeded in loads their generating capabilities with the largest unit in the system down (in other words, without interconnections their generating capabilities will not sustain their load requirements with firm power); Exhibit 23 shows that from 1956 to 1960 Mississippi Power Company's sales to ultimate consumers and electric power associations increased by 49.1%; Exhibit 24 shows that for the same period Mississippi Power & Light Company's increased by 39.2%. Exhibit 211 shows that in a ten year period from 1950 through 1960 the four respondents had an increase in power sales of 260.20% and the nine members of South Mississippi Electric Power Association had an increase of 262.43%.

13. The construction and operation of petitioner's proposed system would not result in uneconomic duplication of facilities of other utilities. This record does not show that any substantial duplication of transmission facilities would be produced by the construction of the proposed system by the petitioner. In virtually all instances protestants' transmission lines were already in place before the delivery points were estab-

lished thereon to serve the respondents. Only in a few instances would the transmission lines of petitioner's proposed system physically parallel those of protestants. (Rec. pp. 12,377–12,378).

We have heretofore stated that the order of the commission was based upon substantial evidence. The rule announced in Tri-State Transit supra, and here repeated in part "[t]hat a certificate should not be granted where there is existing adequate service over the route applied for * * *" is urged upon us by the protestants as being applicable here. We cannot agree with this contention. A comparison of Tri-State with the case at bar produces a strained analogy at best. It dealt with the right of two common carriers (bus companies) to offer passenger service to the public over the same route or highway. The commission found that a certificate of public convenience and necessity was not warranted by the facts before it. This order was reversed by the chancery court on appeal and the chancery court's order was reversed by this Court and the commission's order reinstated. Though the "existing facility" rule was announced in the opinion, the case actually turned upon the basis of there being substantial evidence to support the finding of the commission. Here the issues are not directly related to the public. Neither are they related to the same service area, but rather the issues presented here relate to the contested right of two corporate utilities to serve with wholesale electricity a facility (delivery point) or link between or adjacent to two service areas. However, assuming but not deciding, that there is a close analogy between the two cases, we still are of the opinion that this assignment of error is not well taken. We rely upon the commission's specific finding that there was no uneconomic duplication here and in so doing we follow precisely the Court's ruling in Tri-State as it too relied specifically upon the finding of the commission as the basis for its decision. Compare Keith supra wherein we stated: "The fatal flaw in Monroe's argument is this: There was substantial evidence to support the finding of the Commission * * *." (251 Miss. at 114, 168 So. 2d at 730). We conclude this assignment of error is not well taken.

[5-8] The protestants further contend that the order of the commission was erroneous in that it impaired valuable rights existing in them by virtue of the "grandfather" certificates they hold which authorize them to sell electric energy to the power associations. They cite Capital Electric Power Ass'n v. Mississippi Power & Light Co., 240 Miss. 139, 150, 125 So. 2d 739, 743 (1961) wherein we held:

> Having served the electrical requirements in the Elton area for more than 17 years, Capital Electric, under paragraph (b) of Section 5, Laws of 1956, Section 7716-05, Code of 1942, acquired the right to a certificate of convenience and necessity therein, being in truth and in fact a franchise from the State. Such right is indeed a valuable or ...

The certificates of the protestants authorize the sale of electricity to specified delivery points. The certificate of Mississippi Power Company is restricted by the following language of the commission:

> The commission is not hereby adjudicating the legal effect of the certificate herein granted as to service to the aforesaid associations, nor is the commission determining in this proceeding that the certificate herein granted binds said associations to continue receiving such service.

There can be no doubt the protestants will be affected to some degree by the certificate granted to the petitioner as .32% of Mississippi Power & Light Company's 1960 business stemmed from its sales to the associations and 4.14% of the business of Mississippi Power Company from its sales for the same period. The generating facilities of the petitioner will supplant these sales to the associations. It is well to keep in mind that petitioner is a federation of nine power associations, respondents being four of them, so in essence petitioner is a corporation through which the associations will generate their own power as they have the statutory right to do under the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, Mississippi

Code Annotated section 5463 et seq. (1956). The issue thus restricts itself to this narrow question: Do the protestants by their certificated rights to sell, which we have held to be valuable, acquire by the certificates the absolute right to continue these sales to a utility which desires to generate its own electricity and which has a statutory right so to do? An affirmative answer to this question would indeed render the petitioners captive customers of the protestants who are in reality their competitors. We find no comfort in the authorities cited by counsel nor were we able to find direct authorities by our own research to answer this perplexing question. We turn again to the commission's finding and order as to the results we should reach. It found:

> For a number of years there has been a constant need for additional generation and transmission facilities in this state and this need will continue to grow. The need for more generating capacity is greater than the capacity of the facilities which the petitioner proposes to construct and operate. This is true despite the splendid interconnections which protestants have with other sources and systems within their own respective groups * * *

In candor we should state that the commission has not found the services of either of the protestants to be inadequate, but rather found, as noted, there was a need for additional generating capacity broad enough to encompass the 65-megawatt generating facility authorized. Under these circumstances (a deficit of generating capacity) we are of the opinion that the commission properly held the needs of the public above the grandfather certificates of the protestants as we are of the opinion that it was not the legislative intent that a grandfather certificate under Section 7716-05(b) was to supersede the Electric Power Association Act, Chapter 184, Mississippi Laws of 1936, which authorized the associations to generate their own energy. The so-called "franchise" doctrine, referred to in the Elton case for example, does not apply to the issuance of a certificate of convenience and necessity for a wholesale

electric transmission line. Such a certificate is a privilege, regulated and controlled by the state within due process limitations. The idea that a franchise or charter granted by the state may be immutable and unamendable by the state was finally and effectively eliminated by the 1890 Constitution. Mississippi Constitution 1890 §§ 178, 179, 180, 181, 182; cf. Southern Bell Tel. & Tel. Co. v. City of Meridian, 241 Miss. 678, 131 So.2d 666 (1961). In reaching this conclusion we note that the loss of sales by the protestants, though not insignificant, is not total as the energy may be diverted to their own needs for which there is ample demand.

[9] Protestants contend further, however, that under the provisions of Section 7716–05(f) they are entitled to the particulars of any inadequacy of service, either under the "existing facility" or "valuable franchise" rule, and that they must be afforded a reasonable time by the commission to correct such inadequacy. This statute provides:

> (f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any *area* covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the *area* affected, may be revoked and cancelled by the commission. (Emphasis ours.)

Protestants urge that since the petitioner did not directly follow the statutory remedy for inadequacy, that, in effect,

the petition under Section 7716-05(c) (certificate of public convenience and necessity) is a collateral attack upon their valuable franchise rights and they are deprived of due process thereby. We are of the opinion this contention is not well taken as the statute refers to a specific service area and not to a facility (delivery point) as here, and there is no finding that the protestants are not rendering "reasonably adequate service", and by the plain terms of the statute the remedial provisions thereof are not applicable until there be such finding. We conclude that this assignment of error is not well taken and that the protestants' constitutional rights were not violated by the order of the commission in this proceeding.

Finally, protestants contend that the commission's order should be reversed because public convenience and necessity cannot be predicated upon the operation of facilities in violation of law. They urge that public convenience and necessity fails when it is shown without dispute that the terms of the federal statute (Title 7, section 904, U.S.C.A.), and the terms of the loan agreement itself would be violated in that the loan would be used to duplicate existing "central station service."

In the case of Alabama Electric Cooperative v. Alabama Power Co., 278 Ala. 123, 176 So.2d 483, 487 (1964), the court made the following statement:

> It has been consistently held that the legality of a loan approved by the Administrator of the REA is not subject to a collateral attack in a hearing before a public service commission or the duly constituted state authority which, in Alabama, is the Director of Finance. (Citing cases). In each of these decisions, the question of the violation of the central station service feature of the federal act was raised but, in each instance, the decision was in favor of the cooperatives. In view of the authorities cited supra, we feel that we cannot agree with the contention of appellees that this is a question on which we should pass.

[10] Without deciding whether protestants have standing to raise this question we hold, as did the Alabama

court, that this question is not a proper one to be raised in this proceeding.

[11] The electric power associations are products of legislative enactment. They are privileged to use the powers granted in such enactment and are of course subject to its limitations. As such they have legal status comparable to other utilities without this Court's opinion as to the underlying philosophy of the act.

We are of the opinion the cause should be affirmed.

Affirmed.

All Justices concur.

West Key Number System.

(5334-8)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 597

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, ET AL.,
Respondents.

BRIEF OF RESPONDENT SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 597

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, ET AL.,
Respondents.

No. 45,065 IN THE SUPREME COURT OF MISSISSIPPI

BRIEF OF RESPONDENT SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

I. THE RECORD

At the instance of petitioners the Clerk of the Supreme Court of Mississippi did not certify to this Court the entire record of proceedings in that Court but parts thereof were omitted.

At the instance of respondent additional parts of the record in the Supreme Court of Mississippi are being certified to this Court to be on file when this brief is filed.

That part of the record in the Supreme Court of Mississippi contained in bound volumes is in eighteen (18) volumes numbered with Roman numerals. In keeping with rules of this Court and for convenience that part of the record will be cited by volume and page, thus: "R. I, 1", meaning "Record, Volume I, Page 1", etc.

II. APPENDICES

Appendices to the petition herein include copies of documents which are appropriately before the Court in this form and will not be duplicated in this brief. They will be referred to herein where appropriate. For convenience the reference will be to: "Pet. A. 1, P. 19", meaning "Petitioners' Appendix No. 1, Page 19 of Petition", etc.

Copies of additional documents are made appendices to this brief for reasons which will hereinafter appear as follows:

Appendix 1: "Electric Power Association Act" of Mississippi (Chapter 184, Mississippi Laws of 1936, as Amended; Section 5463, et seq., Volume 4A, Recompiled, Mississippi Code of 1942)

Appendix 2: Sections 26 and 27, Chapter 372, Mississippi Laws of 1956 (Sections 7716-26 and 7716-27, Volume 6, Recompiled, Mississippi Code of 1942)

Pages of the appendices hereto will be numbered serially beginning with page "A1".

III. STATEMENT OF THE CASE

On March 31, 1960, South Mississippi Electric Power Association, a respondent herein (called respondent), filed its petition before the Mississippi Public Service Commission (called Commission) for a Certificate of Public Convenience and Necessity authorizing it to construct and operate an electric generating and transmission system consisting of a steam electric generating station to be located at Mozelle in Jones County, Mississippi, and transmission lines radiating therefrom into seventeen (17) counties in Eastern and Southeastern parts of the State for the purpose of providing a wholesale supply of electricity to four (4) of its corporate members (themselves electric power associations engaged in the distribution and sale of electricity to the public at the retail level).

The petition was protested by Mississippi Power Company and Mississippi Power & Light Company (called petitioners).

On March 7, 1963, after extended hearings the Commission entered its final order in that cause (Docket No. U-508) granting unto respondent the Certificate as prayed for. Petitioners appealed to the Chancery Court of the First Judicial District of Hinds County, Mississippi (the intermediate court of appeals in such cases), where the order was affirmed by final decree entered January 22, 1965; thereupon petitioners appealed to the Supreme Court of the State where the order was again affirmed by opinion and judgment entered February 14, 1966 (Pet. A. 7, P. 96, et seq.).

Due to extended hearings before the Commission and an abortive "appeal" taken by petitioners at an early stage in that proceeding, first to the Chancery Court, then to

the Supreme Court of the State, as well as delays incident to the appeal by petitioners from the final order of March 7, 1963, aforesaid (record on that appeal contained more than 12,000 pages in 82 volumes) there was a lapse of six (6) years (lacking ten days) from the time the petition was filed before the Commission, March 31, 1960, and the time when the State Supreme Court's affirmance became effective (following denial of petitions for rehearing) March 21, 1966—three (3) years and fourteen (14) days from the date of the order.

During this period respondent was prevented from commencing construction of its system because when petitioners took their appeal from the Commission's final order aforesaid they petitioned for, posted security and obtained a "stay order" (as they had a statutory right to do) which operated in like manner as a supersedeas (A. ~~19-20~~ 20-22).

Meantime, the load which respondent had been authorized to serve was growing. On July 20, 1965, while the appeal to the State Supreme Court was still pending respondent filed with the Commission a petition for an amendment to its Certificate permitting increases in the capacity of its system to keep up with the growing load. After the appeal finally failed, as aforesaid, the Commission heard the petition for amendment (petitioners protested that petition also) and granted the amendment by order entered January 4, 1967 (Pet. A. 1, P. 19, et seq.).

From that order petitioners appealed to the Chancery Court where the order was by decree entered on December 22, 1967, affirmed in part and reversed in part, and the cause was remanded to the Commission for further proceedings (Pet. A. 2 ~~and 3,~~ PP. 68-72).

From this decree respondent appealed to the State Supreme Court where on June 10, 1968, the decree inso-

far as it reversed the order of the Commission was reversed and the order of the Commission was reinstated in its entirety (Pet. A. 3, P. 73, et seq.). Petitions for rehearing were denied July 8, 1968 (Pet. A. 4, P. 83).

Pending the appeal respondent filed a petition before the Chief Justice of the State Supreme Court for a Writ of Supersedeas averring that after expiration of the stay order aforesaid (on March 21, 1966) and entry of the Commission's order of January 4, 1967, amending the Certificate, respondent had commenced construction of its system; that the construction program was well advanced (over $10 million thereof being already under firm contracts); that it would be in the public interest as well as that of respondent for the construction program to proceed normally, pending the appeal, etc. The application was supported by numerous exhibits attached. The Chief Justice, although having statutory authority to act alone, elected to refer the application to the Court en banc and on February 8, 1968, the Court en banc entered its order granting supersedeas. Thus construction was not and has not been interrupted. See parts of record sent up with "Supplemental Certificate of Clerk of Supreme Court of Mississippi" dated October 29, 1968.

Petitioners in due course following denial of their petitions for rehearing by the State Supreme Court on July 8, 1968, filed the petition for a writ of certiorari which is now before this Court

IV. PETITIONERS' STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate and misleading in the following respects:

(a) It asserts that respondent's petition to the Commission for an amendment of its Certificate was for "a different system in lieu of that specified in the 1963 Cer-

tificate" (Pet., 4); whereas, the petition for amendment was merely for adding capacity by means of certain modifications and additions to facilities in order to take care of normal load growth occurring during the time respondent was prevented from commencing construction by the stay order issued at the instance of petitioners.

(b) It asserts that "No construction has been undertaken pursuant to the original Certificate." (Pet., 4-5); whereas, construction was well advanced under that Certificate as amended at the time of the appeal by respondent from the Chancery Court's decree of December 22, 1967, as is fully shown hereinabove.

(c) It implies that the Commission received evidence offered by respondent tending to show that respondent should be permitted to enter the field of generation and transmission upon the basis of public convenience and necessity as opposed to the four (4) corporate members of respondent continuing to purchase power from petitioners (Pet., 6-7) (note particularly on Page 6 "At the hearing, respondent was permitted to introduce, and the Commission received, all the evidence it offered, including testimony with respect to the cost of the project and economics of operation."); whereas, nothing could be further from the truth. The evidence offered by respondent and received was on the proposition that in view of the delay in construction (which was caused not by respondent but by the stay order obtained by petitioners) and the load growth which had occurred and was normal, increased capacity was imperative and it could be more economically and efficiently provided by modifying construction in certain particulars, including the use of larger generating units, as initial construction, rather than building as originally certificated and adding on. The very record citations given by petitioners on page 6 will plainly show that this is true.

(d) The implication goes further (Pet., 6-7) and suggests that petitioners were denied the privilege of introducing evidence on issues on which evidence had been received from respondent. This implication is completely untrue. Respondent's evidence was limited to what would be the most economical and efficient means of providing increased capacity in the system and petitioners offered no evidence whatever on this proposition (Pet. A. 1, PP. 37-41—Commission's Order of January 4, 1967; Pet. A. 3, PP. 77-78—Opinion of State Supreme Court of June 10, 1968).

(e) Petitioners' Statement of the Case is moreover fatally defective in that with respect to the alleged federal questions relied upon it fails to meet the requirements of Supreme Court Rule 23-(f) in these particulars: (1) it does not specify "the way in which they were passed upon by the Court"; and (2) it does not set out "pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears. . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

V. ARGUMENT

(a) Two Theories of the Case

The only question presented by the petition is whether in the hearing before the Commission the petitioners (as protestants) were denied a fair hearing meeting requirements of the Fourteenth Amendment to the Federal Constitution on issues presented by the petition which was before the Commission. Petitioners claim they were denied such a hearing because the Commission excluded certain evidence offered by them as being irrelevant and limited cross-examination at certain points on the same basis. In order to answer the question as to whether there was a fair

hearing the issue or issues presented by the petition before the Commission must be identified. That petition is found in Volumes II, III, and IV at Pages 7-90 of the Record, to which the Court's attention is respectfully invited.

Respondent and petitioners held diverse views as to the issues presented by that petition as follows:

(1) Respondent's view, which was shared by the Commission and the State Supreme Court, was that the Commission should not and could not try over again the issues which had been settled in its order of March 7, 1963 (whether there was an adequacy of generation and transmission facilities in the state; comparison of power costs; comparisons of quality of service; adequacy of proposed facilities for purposes intended; grandfather rights; whether wholesaler should build transmission lines to load centers of purchasing retailers; whether when all things are considered the public convenience and necessity required or would require that the loads involved should be allocated to respondent, etc.), which order had been finally approved and affirmed by the State Supreme Court; that those issues had already been fully heard and settled by said order of March 7, 1963; that the purpose of the petition then before the Commission was simply to provide increased capacity in the system to handle load growth occurring during delay in construction caused by litigation and a stay order (load growth being normal), the increase to be by means of additions to and modifications of facilities; and the scope of the evidence should not therefore include a retrial of the original proceeding (which incidentally required 78 days of hearing time and produced a record of some 12,500 pages in 82 volumes) under which the loads involved had been allocated and certificated to respondent; and

(2) On the other hand, the view of the protesting power companies, petitioners here, was that inasmuch as

respondent had not actually constructed its system (regardless of the reason for the delay) it could not be authorized by certificate amendment to increase the capacity thereof by means of modifications and additions to meet load growth; that this amounted to abandonment of the originally certificated system and the petition before the Commission had to be regarded as a new start as if the order of March 7, 1963, had never been issued; wherefore all of the issues with respect to public convenience and necessity which had been adjudicated in the order of March 7, 1963, had to be litigated and adjudicated all over again.

This basic difference of opinion as to the nature of the matter before the Commission accounted for all of the rulings about which petitioners (as protestants) complained before the Commission and the courts below; and now complain in their petition to this Court for a writ of certiorari.

(b) Exclusion of Evidence Offered by Petitioners (As Protestants)

Under respondent's theory of the case the "issues" before the Commission were: whether the loads of respondent had grown during the time it was prevented from commencing construction by the appeals and stay order; if so, how much; what were the forecasts of further growth during the next several years; and what would be the best means of increasing capacity to take care of load growth? And petitioners (as protestants) offered *no evidence* on these issues. They clung tenaciously to their thesis that because respondent had to have increased capacity (albeit the delay was brought about by petitioners themselves!) it had thereby "abandoned" its certificated generation and transmission system, was out of the field entirely and was seeking authority to enter the field with "another and different" system.

The Commission made findings on the point as follows:

> 23. Protestants made no serious effort to show that it would be in the public interest for Petitioner to build its system as originally certificated and add onto it rather than building the modified system with increased capacity as sought by the Petition. Rather Protestants seemed to advance the theory that since Petitioner is seeking permission to increase the capacity of its system in the manner set forth in the Petition, it has "abandoned" its original system, now proposes to build a "different" system, and it is therefore required to again prove public convenience and necessity for entering the generation and transmission field; and under this theory Protestants sought to bring up and litigate all over again the basic issues involved in the original proceeding.
>
> 24. In the opinion of the Commission, those issues have been heretofore fully litigated and decided in favor of Petitioner and against Protestants; and that determination has been affirmed by the highest Court of our State. For all purposes of this proceeding, Petitioner is in the opinion of the Commission already in business in the generation and transmission field. If this view were not adopted, it would be easy to see how a Petitioner might file its petition, prove its case, be awarded a certificate to enter the field, be carried up on appeals by Protestants, win in the courts, find that its loads had increased in the interim; start all over again by petition to modify its facilities to provide for the increased loads (the Commission judicially knows loads have been for a long time increasing at the rate which doubles them at intervals of from seven to ten years) only to be met again by Protestants (who may have, in the meantime, mended their ways and better prepared themselves to protest) and if fortunate enough to win again, again start the journey on appeals; and so on *ad infinitum*; so that even the most deserving Petitioner, under the most impelling circumstances insofar as the public interest is concerned,

> might find itself continually applying for certificates but never able to enter the field. This sort of situation could approach the making of some utilities "captive customers" of others, a thing frowned upon by our Supreme Court in this very case (*Mississippi Power Company, et al.* v. *South Mississippi Electric Power Association, et al.*, 183 So. 2d 163, 170); and certainly such a situation would, for obvious reasons (suppression of competition, protracted litigation, unnecessary expense, etc.) be inimicable to the public interest.

The parties were before the Commission on two different cases, so to speak. Respondent was there on a petition to increase capacity to meet load growth; petitioners as protestants were there to contend that the original case should be tried all over again.

All testimony and exhibits, the exclusion of which is assigned as grounds for issuance of the writ of certiorari (Pet., 6-7) were on the question of *whether* respondent should enter the field of generation and transmission in the state; *none* on the question of whether respondent needed increased capacity in its system to handle normal load growth occurring while it was under a stay order and, if so, the best means of providing the increased capacity.

The State Supreme Court in its opinion (*South Mississippi Electric Power Association* v. *Mississippi Public Service Commission, et al.*, 211 So. 2d 827 (1968); Pet. A. 3, P. 73, et seq.) after the most careful consideration readily followed and adopted the views of the Commission on the scope of the issues involved, quoting with approval the above quoted paragraphs 23 and 24 of the Commission's order. The Court said inter alia (211 So. 2d at P. 829, et seq.):

> Appellees protested the granting of the amended certificate and contended among other things that the facilities and generating plant described in the petition

to amend was not a modification of the facilities and plant authorized by the order of March 7, 1963, but instead was a new and different plant and that it was in effect an original application and an abandonment of the certificate granted. As a consequence thereof appellees argue that appellant was required by the Public Utility Act of 1956 to prove, as it did in the original petition, that public convenience and necessity require construction of any facilities by appellant. Singing River, Dixie, Southern Pine and Pearl River Valley electric power associations filed a petition to intervene and they were allowed to do so. They joined in the request that the amended application be granted. The commission confined the issue to be tried on the amended application to the question of whether public convenience and necessity required the construction of the enlarged system rather than the system originally authorized. It rejected the evidence offered by appellees designed to show that public convenience and necessity did not require the construction of any facilities by the appellant. It also refused to allow appellees to cross-examine appellant's witnesses on this issue. The commission held that the testimony offered was immaterial to the issue before it at that time. Appellees were allowed to proffer the evidence rejected and it is in the record before us. The hearing was extended over a period of several weeks and resulted in a rather lengthy record, which we have carefully reviewed.

On January 4, 1967, the commission entered an order sustaining the petition and granted an amended certificate authorizing appellant to construct the enlarged system. The order of the commission deals with all the questions involved in this appeal but due to its length we will only set out herein such portions as we deem appropriate.

The commission found from the evidence that:

31. From all of the evidence, the commission is of the opinion and finds that the granting of an order herein amending the certificate of public con-

venience and necessity heretofore granted to Petitioner by the Order of March 7, 1963, in manner and form as sought by the Petition to Amend would materially benefit the Petitioner, the four corporate members of Petitioner to be supplied with power at wholesale by Petitioner and that segment of the public served by said corporate members of Petitioner; this would be particularly true in that Petitioner would thereby be enabled to build its system up to the capacity presently required in a more orderly way with a substantially smaller capital investment and would obtain a more efficient operation than would be the case if it approached the problem by building the system as originally certificated and making additions thereto.

32. On the whole record therein, the Commission is of the opinion and finds that the Petitioner has sustained its Petition to Amend its certificate of public convenience and necessity heretofore granted on March 7, 1963, by the evidence and that the public convenience and necessity require and will require that the Commission issue an order herein amending said certificate of public convenience and necessity in manner and form as sought and prayed for in the Petition to Amend, as amended.

Appellees appealed to the Chancery Court of the First Judicial District of Hinds County. The chancellor, after reviewing the record, wrote a memorandum opinion wherein he concurred with the commission in its finding that the order as affirmed in *Mississippi Power Company*, supra, was res judicata in this cause. He also concurred with the commission in its finding that the delay of the appellant in constructing the authorized generating plant and transmission lines was through no fault of appellant, but was solely caused by appellee's appeal. The chancellor then stated:

It is my opinion that the issue for trial before the Commission on this second petition was whether public necessity and convenience required the increased facilities or any part thereof, due to increased needs and demands, if any, and increased or decreased supply, if any, occurring since the order on the original petition.

The Commission proceeded to try the issue, but it is my humble judgment that the Commission committed reversible error when it refused to permit the respondents to cross-examine petitioner's witnesses and refused to permit the respondents' witnesses to testify in defense of the issue and refused to receive in evidence the exhibits offered in defense of the issue.

Therefore the order of the Commission is affirmed as to continuing the order on the original petition in full force and effect, but it is reversed and remanded to the Commission for a new trial on the issue of whether or not public necessity and convenience requires the enlargement of the generating plant and transmission lines as prayed for by the petitioners, and to hear all competent evidence offered by both sides or parties to determine the issue. That is to say, follow the same procedure and rules of evidence they followed on a hearing of the first or original petition on its merits, and in accordance with our Supreme Court's opinion affirming the original order, supra, and this opinion.

I hold as a matter of law that the respondents may offer evidence that the original facilities with the enlargement thereof are not a public necessity and convenience to show that the enlargement of the facilities is not a public necessity or convenience, but no further, as they cannot attack the facilities as first authorized.

A decree was entered in accordance with the chancellor's opinion and from that decree this appeal is prosecuted. There is no cross-appeal.

The principal question for determination is whether the chancellor was correct in holding that the commission was in error in rejecting the testimony offered by appellees and in limiting the cross-examination of appellant's witnesses.

A determination of this question depends upon the scope of the issue to be tried by the commission on hearing the petition for an amended certificate. Appellant urges that the only issue to be tried by the commission was whether public convenience and necessity required the construction of the enlarged system instead of the facilities authorized in the original certificate. It is their contention that the commission properly limited the testimony to this issue and that the testimony offered by appellees was incompetent and irrelevant to the issue. On the other hand appellee urged that the chancellor correctly held that the commission was in error in rejecting the testimony offered by them to show that public convenience and necessity did not require the construction of any facilities by the appellant. In discussing this issue, the commission said:

> (Here is quoted Paragraphs 23 and 24 from the Commission's Order of January 4, 1967, quoted above)

. . . .

When we analyze the situation with which the commission was confronted, we find that it properly limited the issue to the question of whether public convenience and necessity required the construction of the enlarged facilities requested in the amended application rather than the facilities authorized in its order of March 7, 1963. After we had affirmed its action in granting the certificate of public convenience and necessity to appellant to construct the authorized facilities and the Supreme Court of the United States had refused to grant certiorari, neither the commission nor anyone else could prevent appellant from constructing those facilities and delivering the electricity gen-

erated to its member associations at the authorized delivery points. So actually all the commission could legally do was to either grant or refuse to grant the amended certificate. It could not take away appellant's right to construct the facilities that it had authorized; it could not hold that by delay, appellant had abandoned its right to construct those facilities because appellant had been prevented from building them by the "stay order" granted at the appellee's request. If it had denied the petition, appellant could have proceeded to construct the authorized facilities and then applied for an amended certificate to enlarge them. The proof shows that the facilities proposed in the amended application can be constructed for far less money than it would cost to construct the original facilities and then to add to them the necessary generating units and transmission lines to properly serve the needs of the four associations with which it holds contracts to supply wholesale electricity. Under these circumstances the proof offered by appellee was not relevant to the issue and the commission properly rejected it. Neither did it unduly restrict appellee's right to cross-examine appellant's witnesses.

Appellee's contention that the facilities proposed in the amended application are new and so different as to amount to an original application is without merit. The enlarged plant is to be constructed at the same location as the plant originally authorized. Its principal difference is that it will be capable of generating more electricity. It will still be a plant for the generating of electricity. Appellant was authorized to construct certain transmission lines by the original certificate to serve its member associations at certain delivery points. The amended application sought authority to build more miles of the same type transmission lines and to deliver electricity at more delivery points, but these lines and delivery points will serve the same associations it was authorized to serve in the original application except for one delivery point at Leakesville. Though the commission found this delivery point was not included in the original certificate, it was shown

by the undisputed evidence that in the original proceeding appellant had proposed to pick up this delivery point on or about July 1, 1965, being one year after the original start-up. This point is now served by Mississippi Power Company, but the commission found that Mississippi Power Company directed no objection to the picking up of this delivery point as such. The commission found that it is an intermediate delivery point between Lucedale and Rocky Creek sub-stations in the extreme southeast portion of appellant's proposed transmission system and the State Line substation located thirty miles or more to the north, and that without this delivery point there would be no intermediate delivery point on this line. The commission found that there was sufficient evidence to establish that public convenience and necessity required and will require that this delivery point be included in appellant's overall system.

While it is true appellant had not at the time of the hearing of the amended application or at any other time generated any electricity or built any transmission lines, it held a certificate which authorized it to do so and we are of the opinion that for all practical purposes insofar as the hearing before the commission is concerned that they were in the same position as any other public utility seeking to increase its facilities to properly serve the needs of those it was authorized to serve.

(c) Cross-Examination

The refusal of the Commission to permit cross-examination of two of respondent's witnesses on certain points complained of (Petition page 8, paragraph numbered 7) also fell squarely within the category of *whether* respondent should be permitted to enter the field of generation and transmission in the state, an issue previously determined in the original proceeding and not involved on the petition to amend, as to which the State Supreme Court said (211 So. 2d at P. 829; Pet. A. 3, P. 75):

> It (the Commission) rejected the evidence offered by appellees designed to show that public convenience and necessity did not require the construction of any facilities by the appellant. It also refused to allow appellees to cross-examine appellant's witnesses *on this issue*. The Commission held that the testimony offered was immaterial to the issue before it at that time. (Emphasis added)

More detail could be given on the exact nature of the evidence sought to be elicited by cross-examination but reference to the passages of the Record cited by petitioners will bear out precisely what the Court said on the point.

VI. USAGES IN PUBLIC UTILITY REGULATION

Petitioners have not questioned the authority of the Commission upon proper application and showing to amend a Certificate of Public Convenience and Necessity previously issued by it before actual construction of the authorized facilities is commenced—whether to increase or decrease capacity or otherwise modify the facilities as the factual situation may require; and they could not well do so lest they block their own paths in such cases to which they of necessity must resort not infrequently.

It is pointed out, however, that as a matter of necessity there is an established usage in public utility regulation in this country that permits and often requires the amendment of certificates of public convenience and necessity in the public interest before or during construction of the facilities authorized to be constructed and operated under such certificates. There is particularly such a necessity in the electrical utility business where there are continuous changes and shifts in locations of electrical loads and there is an overall steady trend of increase in the use of electricity. The Commission in its order of

January 4, 1967, judicially noticed that there has been a long time trend of increase in use of electricity making system loads double every seven to ten years (Pet. A. 1, P. 40, paragraph numbered 24). Actually, the load certificated to respondent by the order of March 7, 1963, was shown by the evidence on the petition to amend to have increased during a ten year period (1954-1964) at an average rate of 12.7%; so that the load doubled every 5.8 years (R. VI, 388). This is above the average for the entire industry, which is seven to ten years (R. XVII, 1766).

The Commission made a finding concerning the necessity and usage aforesaid (Pet. A. 1, P. 38, paragraph numbered 21; R. XVII, 1762-1763, paragraph numbered 21):

> 21. It is not infrequently found to be needful and in the public interest, particularly in view of the nature of the generation and transmission business which is affected by the constantly changing and fluctuating use of electricity in various localities, and the trend toward increased use thereof generally, that certificates of public convenience and necessity be amended even before construction begins, or during construction, to meet the needs of the system. Examples of such cases may be found in this record, put there by one of the Protestants, to-wit:
>
> (a) On August 12, 1963, in Docket U-825, the Commission granted a certificate to Mississippi Power & Light Company authorizing it to construct and operate *inter alia* approximately 140 miles of extra high voltage transmission lines to be constructed for operation at 345 KV; before said lines were built and on December 14, 1964, said Mississippi Power & Light Company filed its petition in the same cause to amend said certificate to authorize modified construction so that said lines would be operated at 500 KV instead, the added capacity being indicated by subsequent engineering studies; and to accelerate the completion

date thereof, due to increases in projected loads; and on January 15, 1965, upon the bases aforesaid, the Commission granted the amendment for the modified lines with *different* and *larger components* to provide *added capacity*; and

(b) On August 12, 1963, in Docket U-826, the Commission granted a certificate to Mississippi Power & Light Company authorizing it to construct and operate a steam generating station near Vicksburg in Warren County, having a capacity of 400 MW; before said station was built, and on December 14, 1964, said Mississippi Power & Light Company filed a petition to amend in the same cause and under the same docket number seeking authority to substitute a larger generating unit and increase the capacity of the station to 500 MW, because load forecasts for its system had been revised and the increased capacity was needed in order to meet the projected requirements of its system; and on January 15, 1965, the Commission granted the amendment authorizing the *substitution* of *equipment of greater capacity* and *increasing the capacity of the said station* to 500 MW.

(The original order in Docket U-825 is Exhibit "PA 57" in the evidence, and the order amending the certificate is Exhibit "PA 58". The original order in Docket U-826 is Exhibit "PA 59" in the evidence, and the order amending the certificate is Exhibit "PA 60".) (Emphasis added)

While the usage is an obvious necessity and is general in the regulatory field no party to the proceeding in the Court below cited a single Court decision on the propriety vel non of the usage. This is no doubt because no utility ever questioned in Court the necessity or propriety of the usage. Actually, other utilities should have no interest or concern when a sister utility finds need to increase system capacity to handle its own loads (loads of other utilities not being involved or affected—as in the case here).

The State Supreme Court noted this absence of judicial precedent (Pet. A. 3, P. 80; 211 So. 2d at P. 832):

> Although counsel in their excellent and exhaustive briefs cite numerous decisions by this Court and Courts of other states, they do not cite any cases dealing with a factual situation similar to the one here, nor have we found any.

But the Court found no difficulty in approving the usage as being necessary and in all respects appropriate and proper; eight Justices concurring (one taking no part).

Thus, it is seen that the evidence offered by petitioners and excluded by the Commission was clearly irrelevant and immaterial to any issue presented by the petition to amend; and the very same is true as to the points on which cross-examination of two of respondent's witnesses was restricted.

Actually, petitioners had no interest whatever in the proceeding on the petition to amend since neither of their systems nor their loads were involved or affected in any way whatever (except for the one delivery point at Leakesville, referred to by the Commission and the State Supreme Court as shown above which represented less than 1% of respondent's load [Pet. A. 1, P. 36, paragraph numbered 17 —Commission's Order of January 4, 1967]—and concerning which as such Mississippi Power Company made no objection as is pointed out by both the Commission and the Court). Only the loads and system of respondent were involved. The Commission's Order of January 4, 1967, amending respondent's certificate took nothing from petitioners nor did it affect their interests in any way whatever.

The Commission expressly so found (Pet. A. 1, P. 43, paragraph numbered 29):

29. If the Commission should pursuant to the Petition to Amend enter an order herein amending Petitioner's certificate of March 7, 1963, it *would not take from either of the Protestants any power load* (with the single exception of the Leakesville Delivery Point which has already been dealt with hereinabove); *but would affect only the loads previously certificated to Petitioner* under the Order of March 7, 1963. (Emphasis added)

Actually, Petitioners have not challenged this finding. It is most difficult therefore to understand upon what basis they perceive that their interests have been affected—to say nothing of their "property" having been taken without due process or their having been denied equal protection of the laws.

VII. FOURTEENTH AMENDMENT DOES NOT REQUIRE ADMISSION OF IRRELEVANT EVIDENCE

Neither the due process nor equal protection clauses of the Fourteenth Amendment to the Federal Constitution require any administrative agency or court to receive irrelevant evidence. Certainly this statement requires no elaboration and it hardly calls for the citation of authority. If the amendment required receiving irrelevant evidence it would be a fountainhead of mischief and would destroy rather than safeguard the sanctity of the judicial process.

Stated differently the right to produce evidence of which a person may not be deprived is the right to produce relevant evidence.

Of the great mass of authorities sustaining the above stated proposition these are included: *United States* v. *United States Smelting, Refining and Mining Co.*, 339 U.S. 186, 94 L. Ed. 750, 50 S. Ct. 537, reh. den. 339 U.S. 972, 94 L. Ed. 1379, 70 S. Ct. 994 (1950); *National Labor Relations*

Board v. *Donnelly Garment Co.*, 330 U.S. 219, 91 L. Ed. 854, 67 S. Ct. 756 (1946); *Loesch* v. *Federal Trade Commission*, 257 F. 2d 882 (CA 4), cert. den. 3 L. Ed. 2d 112 (1958); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 143 F. 2d 488, affirmed 65 S. Ct. 821, 324 U.S. 635, 89 L. Ed. 1241 (1945); *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1931).

To briefly note more closely two of the authorities cited above:

In the case of *National Labor Relations Board* v. *Donnelly Garment Co., supra*, the Supreme Court was reviewing the circuit court's denial of a petition for enforcement of an NLRB order. In an opinion by Mr. Justice Frankfurter the Court stated that an inquiry into charges of the employer's domination of a plant union did not make relevant evidence on charges of misconduct against the complainant, the union seeking to unionize the plant. The opinion stated (91 L. Ed. at p. 867):

> The refusal of the Board [NLRB] in effect to try International [the union seeking to unionize the plant] did not impair the validity of the Board's order.
>
> Even in judicial trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence . . . Courts of appeal are less and less inclined to base error on such rulings. Administrative tribunals are given even freer scope in the application of the conventional rules of evidence.

The case of *Baldwin* v. *Iowa State Traveling Men's Association, supra*, is explicit authority for the proposition that due process does not involve the right to litigate the same question twice. In that case lack of jurisdiction of the person was the question sought to be litigated a second

time. It had been litigated in a case in the Federal District Court of the Western District of Missouri (and lost) and was sought to be litigated a second time in the U. S. District Court for the Southern District of Iowa when a proceeding was instituted there based on the judgment in the first suit.

The Supreme Court said inter alia (75 L. Ed., pp. 1246-47):

> The respondent, on the other hand, insists that to deprive it of the defense which it made in the court below, of lack of jurisdiction over it by the Missouri district court, would be to deny the due process guaranteed by the 14th Amendment; but there is involved in that doctrine no right to litigate the same question twice (Chicago L. Ins. Co. v. Cherry, 244 U.S. 25, 61 L. Ed. 966, 37 S. Ct. 492, compare York v. Texas, 137 U.S. 15, 34 L. Ed. 604, 11 S. Ct. 9).

The Supreme Court of Mississippi has clearly held that under state statutes (*Electric Power Association Act*, Chapter 184, Mississippi Laws of 1936, as amended, Section 5463, et seq., Volume 4A, Recompiled, Mississippi Code of 1942, the act under which respondent was organized and operates [Appendix 1 hereto]; and the *Public Utility Act of 1956*, Chapter 372, Mississippi Laws of 1956, Section 7716-01, et seq., Volume 6, Recompiled, Mississippi Code of 1942 [Pet. A. 6, P. 86, et seq.; Appendix 2 hereto]), the respondent was at the time of the hearing upon the petition to amend already in business in the field of generation and transmission in the state with its loads duly certificated to it; and that petitioners' proffered evidence on the question of whether the public convenience and necessity required that respondent enter that field was irrelevant to any issue presented by the petition to amend, as were the points on which cross-examination was denied (Pet. A. 3, P. 73, et seq.—State Supreme

Court's Opinion of June 10, 1968; *South Mississippi Electric Power Association* v. *Mississippi Public Service Commission, et al., supra*).

The Supreme Court of Mississippi is the court of last resort in this state (*Mississippi Constitution*, Article 6, Sections 144, 146; *Mississippi Code, Annotated*, Sections 1941-1993 [1956]). This Court will accept the interpretation of state statutes by the state court of last resort (*Albertson* v. *Millard*, 354 U.S. 242 [1953]; *United States* v. *Burnison*, 339 U.S. 87 [1950]; *Shuttlesworth* v. *Birmingham*, 86 S. Ct. 211 [1965]; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 [1961]; *Clay* v. *Sun Insurance Office*, 363 U.S. 207 [1960]; *Kingsley Corp.* v. *Regents of U. of N. Y.*, 360 U.S. 684 [1959]; and *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167 [1959]).

VIII. PETITIONERS' ARGUMENTS AND AUTHORITIES

Respondent of course agrees that the Fourteenth Amendment requires a full and fair hearing by a state administrative agency; but only upon the issues presented by the petition or application being considered—not upon extraneous and irrelevant matters.

In this part of the petition (Section ~~IV~~ VII, page 10) petitioners come out and say plainly what they implied earlier (Pet., 6), namely, that the Commission heard respondent on subjects on which it declined to hear petitioners. Such is wholly untrue. As has already been shown respondent's entire evidence was on the proposition of modifying and adding to facilities already authorized as the best, most efficient and most economical means of providing for load growth which had occurred while construction was delayed by the stay order (instead of building exactly as previously authorized and

making additions); and petitioners offered no evidence whatever on this proposition. They only offered evidence on the question of whether respondent should enter the field of generation and transmission at all, a question which had already been determined upon the basis of full hearings and was final and unappealable.

It is thus apparent that none of the authorities cited by petitioners are in point and any detailed discussion of them would serve no useful purpose. Respondent freely concedes that the due process and equal protection clauses of the Fourteenth Amendment require a full and fair hearing and equal opportunity to present evidence, etc.; but, again, this relates to issues presented by the particular application or petition and does not extend to irrelevant matters. The rule even allows certain latitude of discretion to the administrative body conducting the hearing as to the scope of the evidence and the scope of cross-examination but not even this point is involved here because petitioners offered no evidence at all on the issues presented by the petition to amend nor did the points on which they were denied cross-examination relate to any such issues.

Petitioners complain that there has been no "determination" as to whether they received a fair hearing; and they are entitled to such a determination. But the State Supreme Court has made that determination in no uncertain terms. It decided that none of the evidence offered by them was relevant to any issue presented by the petition to amend; also that none of the points on which they were denied permission to cross-examine respondent's witnesses were relevant to any such issue. How could there be a more definite determination?

It must be apparent by this time that petitioners actually had no interest whatever in the issues presented

by respondent's petition to amend. They had no more need to attend that hearing than, for example, respondent had need to attend the hearings upon Mississippi Power & Light Company's petitions to amend certificates in Dockets U-825 and U-826 to which the Commission referred in its order of January 4, 1967, quoted hereinabove; U-825 being to enlarge components and increase capacity in a transmission line and U-826 to enlarge components and provide increased capacity in a generating station—neither of which had been constructed at the time the petitions to amend were heard. Those increases in capacity involved only that company's loads (not respondent's) and respondent had no interest; by the same token respondent's petition to amend involved only its loads (not those of petitioners') and petitioners had no interest.

Inasmuch as petitioners lay great store by the case of *Georgia Power & Electric Company* v. *Decatur*, 295 U.S. 164, 79 L. Ed. 1365, brief note of that case will be taken.

Proceeding under a state statute the City of Decatur by ordinance made a paving assessment against the Railway Company for the cost of paving a street on which that company operated a streetcar track. The company took the position that it was not benefited but injured by the pavement and declined to pay the assessment. The City sued and recovered in the trial court. The State Supreme Court affirmed. The company appealed to the U. S. Supreme Court.

Under appropriate pleadings the company had asserted in the trial court that the assessment exceeded the value of all of its properties in the City, including its franchise, and offered to surrender the properties and franchise to the City without the necessity of levy and sale (which offer was refused); also offered a witness to prove that the pavement would not be a benefit but a detriment (specify-

ing details as to the nature of the detriment) but the evidence was rejected. The ground for exclusion of the proffered evidence was that since a demurrer to the bill of complaint had been overruled the proffered evidence was irrelevant and immaterial.

The U. S. Supreme Court found that under the State Court's own interpretation of the statute involved, although the power to determine benefits to the company's property was legislative in character this but placed the burden on the company to overcome the legislative presumption of benefits by showing the assessment to be an arbitrary abuse of legislative authority "because of no benefits".

The Court said (79 L. Ed. at p. 1368):

> By that construction we are bound, and in accordance with it must consider and determine the case. The construction becomes part of the statute as much as though it were found in appropriate words in its text. (citing authorities)
>
> Under the statute and ordinance thus construed, if the burden imposed is without any compensating advantage (as appellants offered to show), the arbitrary abuse of the power exercised is plain (citing authorities); the assessment amounts to confiscation. (citing authorities) And this doctrine has been fully recognized in Georgia. (citing authorities) ...
>
> Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of the court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution. (citing authorities)

As shown above, apart from the Leakesville delivery point concerning which Mississippi Power Company had opportunity to protest but did not, the order of January 4,

1967, amending respondent's certificate took nothing at all from petitioners nor impaired any of their rights. Therefore, this case avails nothing for petitioners.

Petitioners' argument that the holding of the State Supreme Court that evidence offered by them before the Commission was irrelevant was in conflict with that Court's opinion in the former appeal (on the original Certificate) is manifestly erroneous. The same argument was advanced before that Court in the instant cause and was fully answered by the Court itself (211 So. 2d at pp. 831-832) in the course of which the Court said:

> We did not attempt to define the scope of the Commission's inquiry on hearing the petition for an amended application. We certainly did not hold that the Commission should again be required to determine whether public convenience and necessity required the construction of any generating facilities by appellant. We affirmed the granting of the certificate authorizing construction of the facilities proposed in the original application and left to the determination of the Commission whether the Certificate should be amended.

It is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. Harvey Hedgepeth, one of the attorneys of record for South Mississippi Electric Power Association, a Respondent in the above-styled cause, and a member of the Bar of the Supreme Court of the United States, certify that I have this day served the foregoing brief upon Petitioners and other interested persons in the following manner: by depositing copies thereof in sealed envelopes in the United States Post Office at Jackson, Mississippi, first class postage prepaid, properly addressed to each of the attorneys of record of such parties and other interested persons, to-wit: James S. Eaton, Esquire, 2300 Fourteenth Street, Gulfport, Mississippi, Attorney for Petitioner Mississippi Power Company; Thomas H. Watkins, Esquire, Plaza Building, Jackson, Mississippi, Attorney for Petitioner Mississippi Power Company; Sherwood W. Wise, Esquire, Electric Building, Jackson, Mississippi, Attorney for Petitioner Mississippi Power & Light Company; John K. Keyes, Esquire, Collins, Mississippi, Attorney in the court below, and Donald Wadsworth Williamson, Jr., Esquire, Deposit Guaranty Bank Building, Jackson, Mississippi, Attorney of Record in this Court for Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Association, and Pearl River Valley Electric Power Association, Respondents herein; and Bennett E. Smith, Esquire, Assistant Attorney General of the State of Mississippi, State Office Building, Jackson, Mississippi, Attorney for Mississippi Public Service Commission.

This Oct. 30, 1968.

T. Harvey Hedgepeth

T. HARVEY HEDGEPETH

APPENDIX 1

Copy of "Electric Power Association Act" of Mississippi (Chapter 184, Mississippi Laws of 1936, as amended; Section 5463, et seq., Volume 4A. Recompiled, Mississippi Code of 1942)

§ 5463. Short title.

This Act may be cited as the "Electric Power Association Act."

§ 5464. Formation authorized.

Three or more natural persons may, by executing, filing and recording a certificate as hereinafter provided, form a corporation not organized for pecuniary profit for the purpose of promoting and encouraging the fullest possible use of electric energy by making electric energy available at the lowest cost consistent with sound economy and prudent management of the business of such corporations.

§ 5465. Definitions.

The following terms whenever used or referred to in this Act shall have the following meanings, unless a different meaning clearly appears from the context:

(1) "Corporation" shall mean a corporation formed under this Act.

(2) "Bonds" shall mean and include bonds, interim certificates or receipts, notes, debentures and all other evidences of indebtedness, either issued or the payment thereof assumed by the corporation.

(3) "Person" shall mean and include natural persons, firms, associations, corporations, business trusts, partnerships and bodies politic.

(4) "Energy" shall mean and include any and all electric energy no matter how or where generated or produced.

(5) "Acquire" shall mean and include construct, acquire by purchase, lease, devise, gift, or other mode of acquisition.

(6) "System" shall mean and include any plant, works, system, facilities, or properties, or parts thereof, together with all appurtenances thereto, used or useful in connection with the generation, production, transmission or distribution of energy.

(7) "Law" shall mean any Act or Statute, general, special or local of this State.

(8) "Federal agency" shall mean and include the United States of America, the President of the United States of America, Tennessee Valley Authority, the Federal Emergency Administrator of Public Works, the Administrator of the Rural Electrification Administration, and any and all other authorities, agencies and instrumentalities of the United States of America, heretofore or hereafter created.

(9) "Improve" shall mean and include construct, reconstruct, improve, replace, extend, enlarge, alter, better or repair.

(10) "Board" shall mean the board of directors of a corporation formed under this Act.

(11) "Member" shall mean and include each natural person signing the certificate of incorporation of a corporation and each person admitted to membership therein pursuant to law or its by-laws.

(12) "Services" or "service" shall mean the sale or other disposition of energy, electrical appliances, wiring

and equipment at the lowest cost consistent with sound economy, public advantage and the prudent conduct of the business of a corporation.

§ 5466. Certificate of incorporation.

The certificate of incorporation shall state:

(1) The name of the corporation, which name shall include the words "electric power association" and shall be such as to distinguish it from any other corporation organized and existing under the laws of this State.

(2) The location of its principal office and the post-office address thereof.

(3) The maximum number of directors, not less than three.

(4) The names and post-office addresses of the directors who are to manage the affairs of the corporation for the first year of its existence, or until their successors are chosen.

(5) The period of the duration of the corporation, which shall not exceed ninety-nine (99) years.

(6) The terms and conditions upon which persons shall be admitted to membership in the corporation.

The certificate of incorporation may also contain any provisions not contrary to law which the incorporators may choose to insert for the regulation of its business and for the conduct of the affairs of the corporation; and any provisions creating, defining, limiting or regulating the powers of the corporation, its directors and members.

§ 5467. Prohibition on use of words "electric power association."

The words "electric power association" shall not be used in the corporate name of corporations hereafter formed other than those formed pursuant to the provisions of this Act.

§ 5468. Execution and filing of certificate of incorporation.

The natural persons executing the certificate of incorporation shall be residents of the territory in which the principal operations of the corporation are to be conducted, who are desirous of using electric energy to be furnished by the corporation. The certificate of incorporation shall be acknowledged by the subscribers before any officer authorized to take acknowledgments to deeds or other instruments. When so acknowledged, the certificates may be filed with the Secretary of State at any time thereafter within six months of the date of the last acknowledgment. The Secretary of State, upon receipt of such instrument, shall indorse upon it the following:

"Received at the office of the Secretary of State this the ..... day of ....., A.D. ..... together with the sum of $..... deposited to cover the recording fee, and referred to the Attorney-General for his opinion.

Signed .....
Secretary of State"

The Attorney-General shall examine the same and indorse his opinion thereon as follows:

"I have examined this charter of incorporation and am of the opinion that it . . . the Constitution and Laws of this State, or of the United States.

Signed .....
Attorney-General"

The Attorney-General shall without delay refer the same to the Governor for his approval or disapproval. The Governor shall return it to the Secretary of State with his action indorsed thereon. If he approves it, the Secretary of State shall record it in the record kept in his office for that purpose, and certify to the same under the great seal of this State, and transmit it to the applicants; if the Governor disapproves it, the Secretary of State shall file it in his office and notify the applicants of the disapproval and state the reasons therefor. If within thirty days after the Secretary of State has mailed the said notice they have not amended it so as to meet the approval of the Governor, the Secretary of State shall return the fee to the applicants, less the sum of three dollars, which shall be paid into the State Treasury for "charters examined, disallowed and filed." The powers specified in the charter shall, by the approval of the charter, be vested in the corporation and it shall go into operation without further formalities.

§ 5469. Board of directors.

Each corporation formed hereunder shall have a board of directors, and the powers of the corporation shall be vested in and exercised by such board of directors. The directors of the corporation elected to succeed those named in its certificate of incorporation, as well as the directors elected to succeed those presently serving as directors of corporations previously formed hereunder, shall be elected annually by the members entitled to vote as follows: One-third to be elected for a term of one (1) year, one-third for a term of two (2) years and one-third for a term of three (3) years. Thereafter, all directors shall be elected for a term of three (3) years. The directors must be members and shall not be entitled to compensation for their services

as directors but shall be entitled to reimbursement for expenses incurred by them in the performance of their duties. The board shall elect annually from its own number a president and a vice-president.

§ 5470. Powers of board.

The board shall have power to do all things necessary or convenient in conducting the business of a corporation, including, but not limited to:

(1) The power to adopt and amend by-laws for the management and regulation of the affairs of the corporation. The by-laws of a corporation may make provisions, not inconsistent with law or its certificate of incorporation, regulating the admission, withdrawal, suspension or expulsion of members; the transfer of membership, the fees and dues of members and the termination of memberships on nonpayment of dues or otherwise; the numbers, times and manner of choosing, qualifications, terms of office, official designations, powers, duties and compensation of its officers; defining a vacancy in the board or in any office and the manner of filling it; the number of members to constitute a quorum at meetings, the date of the annual meeting and the giving of notice thereof and the holding of special meetings and the giving of notice thereof; the terms and conditions upon which the corporation is to render service to its members, the disposition of the revenues and receipts of the corporation; regular and special meetings of the board and the giving of notice thereof; and such other matters as the board may deem appropriate or desirable.

(2) To appoint agents and employees and to fix their compensation and the compensation of the officers of the corporation.

(3) To execute all instruments.

(4) To delegate to one or more of the directors or to the officers, agents and employees of a corporation such powers and duties as it may deem proper.

(5) To make its own rules and regulations as to its procedure.

(6) To select an executive committee the members of which shall be users of energy supplied by the corporation, and a majority of said members shall be members of the board of directors, and to delegate to said committee any or all of the powers granted to the board of directors in this Act except that the board shall not delegate its powers to adopt and amend by-laws for the management and regulation of the affairs of the corporation.

§ 5471. Certificate of membership—voting.

A corporation may issue to its members certificates of membership in such form as the by-laws may prescribe. Each member shall be entitled to only one vote on each matter submitted to a vote at the meetings of the members of the corporation, but voting by proxy or by mail may be provided for in the by-laws.

§ 5472. Corporate purposes.

Except as hereinafter provided, the corporate purpose of each corporation formed hereunder shall be to render service to its members only. Any person may become and remain a member if such person shall use energy supplied by such corporation and shall comply with the terms and conditions in respect to membership contained in the by-laws of such corporation, which terms and conditions shall be nondiscriminatory. Any person who shall agree to use energy supplied by the corporation from an existing line or from a line the construction of which has been

authorized or commenced by the corporation may be admitted to membership in the corporation prior to such use upon complying with the other terms and conditions with respect to membership contained in the certificate of incorporation or in the by-laws. The membership fee of the corporation shall be fixed by the board of directors. Should the corporation acquire any electric facilities already dedicated or devoted to the public use it may, for the purpose of continuing existing service and avoiding hardship, continue to serve the persons served directly from such facilities at the times of such acquisition without requiring that such persons become members. In no event shall the number of such nonmembers served exceed forty-nine (49%) per centum of the total number of persons served by the corporation. Such nonmember customers shall have the right to become members upon nondiscriminatory terms. The rates to such nonmembers shall be on a cost basis and may exceed the rates to members by only such amounts as may be necessary to meet the full actual cost of service to such nonmembers.

§ 5473. General grant of powers.

Each corporation formed under this Act is hereby vested with all power necessary or requisite for the accomplishment of its corporate purpose; and no enumeration of particular powers hereby granted shall be construed to impair any general grant of power herein contained, nor to limit any such grant to a power or powers of the same class or classes as those so enumerated.

§ 5474. Enumeration of powers.

A corporation created under the provisions of this Act shall have power to do any and all acts or things necessary or convenient for carrying out the purposes for which it was formed, including, but not limited to:

(1) To sue and be sued.

(2) To have a seal and alter the same at pleasure.

(3) To acquire, hold and dispose of property, real and personal, tangible and intangible, or interests therein and to pay therefor in cash or property or on credit, and to secure and procure payment of all or any part of the purchase price thereof on such terms and conditions as the board shall determine.

(4) To render service and to acquire, own, operate, maintain and improve a system or systems within the State and in counties adjacent thereto.

(5) To pledge all or any part of its revenues and to mortgage or otherwise incumber all or any part of its property for the purpose of securing the payment of the principal of and interest on any of its bonds or other obligations.

(6) To use any right of way, easement or other similar property right necessary or convenient in connection with the acquisition, improvement, operation or maintenance of a system, granted by the State or any political subdivision thereof, provided that the governing body of such political subdivision shall consent to such use; and to have and exercise the power of eminent domain in the manner provided by the condemnation laws of this State for acquiring private property for public use, such right to be paramount except as to the property of the State or any political subdivision thereof.

(7) To accept gifts or grants of money, property, real or personal, from any person, municipality or Federal agency and to accept voluntary and uncompensated services.

(8) To make any and all contracts necessary or convenient for the full exercise of the powers in this Act granted including, but not limited to, contracts with any person, Federal agency or municipality for the purchase or sale of energy and/or the acquisition of all or any part of any system, and in connection with any such contract to stipulate and agree to such covenants, terms and conditions as the board may deem appropriate, including covenants, terms and conditions with respect to the resale rates, financial and accounting methods, services, operation and maintenance practices and the manner of disposing of the revenues of the system operated and maintained by the corporation.

(9) To sell, lease, or otherwise dispose of all or any part of its property, subject however to the provisions of Section 14 [§ 5476, infra] of this Act as amended.

(10) To contract debts, borrow money and to issue, assume or indorse the payment of bonds or other evidences of indebtedness.

(11) To fix, maintain and collect fees, rents, tolls and other charges for services rendered.

(12) To acquire and to sell, lease, distribute and generally to deal in electrical and plumbing appliances, apparatus, machinery and equipment for the purposes of and in connection with the promotion of the sale of electric energy to its customers; to assist its customers to purchase or otherwise obtain such appliances, apparatus, machinery and equipment; to assist its customers to wire their premises and to install therein such appliances, apparatus, machinery and equipment; to acquire and to indorse, sell, pledge, hypothecate and dispose of notes, bonds and other obligations of its customers in carrying out the purposes expressed in this paragraph.

(13) To perform any and all of the foregoing acts and to do any and all of the foregoing things under, through or by means of its own officers, agents and employees, or by contracts with any person, Federal agency or municipality.

(14) To condemn any land, easements, or rights of way, either on, under, or above the ground, as the association may deem necessary for any purposes mentioned in this Act, and such property or interest in such property may be so acquired whether or not the same is owned or held for public use by corporations, associations or persons having the power of eminent domain, or otherwise held or used for public purposes, and such power of condemnation may be exercised in the mode or method of procedure prescribed by Chapter 26, Code of Mississippi of 1930 [Title 12, ch. 3, Code of 1942], or in the mode or method of procedure prescribed by any other applicable statutory provisions now in force or hereafter enacted for the exercise of the power of eminent domain; provided, however, that where condemnation proceedings become necessary, the judge of the circuit court or the judge of the county court in counties where the county court exists, in which such proceedings are filed, shall, upon application of the authority, and upon the deposit in court, to the use of the person or persons lawfully entitled thereto, of such amount as the judge may deem necessary to assure just compensation, order that the right of possession shall issue immediately or as soon and upon such terms as the judge, in his discretion, may deem just and proper. Upon application of the parties in interest other than the association, the judge may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceedings.

§ 5475. Operations outside of state.

To the extent necessary in the judgment of the board to make effective the powers conferred by this Act, the corporation shall have power to acquire, own, operate, maintain, and/or improve a generating and/or transmission system or systems outside the State of Mississippi.

§ 5476. Sale of property.

No corporation may sell, mortgage, lease or otherwise incumber or dispose of any of its property (other than (1) property which, in the judgment of the board, is neither necessary nor useful in operating and maintaining the corporation's system and which in any one year shall not exceed ten per centum in value of all the property of the corporation, or (2) merchandise), unless authorized so to do by the votes of at least a majority of its members. During the first year of the existence of a corporation its property shall not be sold or leased, wholly or in part, unless the sale or lease shall be authorized not only by a majority of its members but also by a majority of all persons who have signed customers' survey forms or otherwise signified in writing their intention to become members of the corporation. All such persons shall be deemed to have a beneficial interest in the affairs of the corporation in so far as the sale or lease of the property of the corporation is concerned and the members of the board are hereby declared to be the trustees of such persons with respect thereto.

§ 5477. Issuance of bonds.

A corporation formed hereunder shall have power and is hereby authorized, from time to time, to issue its bonds for any corporate purpose. Said bonds may be authorized by resolution or resolutions of the board, and may bear such date or dates, mature at such time or times, not exceeding

forty years from their respective dates, bear interest at such rate or rates not exceeding six per centum per annum, payable semi-annually, be in such denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption not exceeding par and accrued interest, as such resolution or resolutions may provide. Such bonds may be issued for money or property at public or private sale, for such price or prices as the board shall determine, provided that the interest cost to maturity of the property (at its value as determined by such board, the determination of which shall be conclusive), or money received for any issue of said bonds, shall not exceed six per centum per annum, payable semi-annually. Pending the preparation or execution of definite bonds, interim receipts or certificates or temporary bonds may be delivered to the purchaser of said bonds. Any provision of law to the contrary notwithstanding, any bonds and the interest coupons appertaining thereto, if any, issued pursuant to this Act shall possess all of the qualities of negotiable instruments.

§ 5478. Covenants or agreements for security of bonds.

In connection with the issuance of any bonds, a corporation may make covenants or agreements and do any and all acts or things that a business corporation can make or do under the laws of the State in order to secure its obligations notwithstanding any restrictions contained in Section 14 hereof [§ 5476, supra].

§ 5479. Purchase and cancellation of bonds.

A corporation shall have power out of any funds available therefor to purchase any bonds issued by it at a price

not exceeding the principal amount thereof and accrued interest thereon. All bonds so purchased shall be canceled.

§ 5480. Consolidation.

Any two or more corporations created under the provisions of this Act may enter into an agreement for the consolidation of such corporations. Such agreement shall set forth the terms and conditions of the consolidation, the name of the proposed consolidated corporation, the number of its directors, not less than three, the time of the annual meeting and election and the name of at least three persons to be directors until the first annual meeting. If such agreement is approved by the votes of a majority of the members of each corporation, the directors named in the agreement shall subscribe and acknowledge a certificate conforming substantially to the original certificates of incorporation, except that it shall be entitled and indorsed "certificate of consolidation ....." (the blank space being filled in with the names of the corporations being consolidated) and shall state:

(1) The names of the corporations being consolidated.

(2) The name of the consolidated corporation.

(3) The other items required or permitted to be stated in an original certificate of incorporation. Such certificate of consolidation and a certified copy or copies thereof shall be filed in the same places and approved by the same officers as an original certificate of incorporation and thereupon the proposed consolidated corporation, under its designated name, shall be and constitute a body corporate with all the powers of a corporation as originally formed hereunder.

§ 5481. Rates.

A corporation formed hereunder shall have power to charge reasonable fees, rents, tolls, prices and other charges for service rendered which shall be sufficient at all times to pay all operating and maintenance expenses necessary or desirable for the prudent conduct and operation of its business and the principal of an interest on such obligations as the corporation may have issued and/or assumed in the performance of the purpose for which it was formed and the revenues and receipts of a corporation shall first be devoted to such operating and maintenance expenses and to the payment of such principal and interest and thereafter to such reserves for improvement, new construction, depreciation and contingencies as the board may from time to time prescribe. Revenues and receipts not needed for these purposes shall be returned to the members, by the reimbursement of membership fees, or by way of general rate reductions, as the board may decide.

§ 5482. Dissolution.

Any corporation created hereunder may be dissolved by filing, as hereinafter provided, a certificate which shall be entitled and indorsed "certificate of dissolution of ....." (the blank space being filled in with the name of the corporation) and shall state:

(1) Name of the corporation and, if such corporation is a corporation resulting from a consolidation as herein provided, the names of the original corporations.

(2) The date of filing of the certificate of incorporation, and, if such corporation resulting from a consolidation as herein provided, the dates on which the certificates of incorporation of the original corporations were filed.

(3) That the corporation elects to dissolve.

(4) The name and post-office address of each of its directors, and the name, title and post-office address of each of and the name, title and post-office address of each of its officers.

Such certificate shall be subscribed and acknowledged in the same manner as an original certificate of incorporation by the president or vice-president and the secretary or an assistant secretary, who shall make and annex an affidavit stating that they have been authorized to execute and file such certificate by the votes cast in person or by mail by a majority of the members of the corporation entitled to vote.

A certificate of dissolution and a certified copy or copies thereof shall be filed in the same places as an original certificate of incorporation and thereupon the corporation shall be deemed to be dissolved.

Such corporation shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations and collecting or liquidating its assets, and doing all other acts required to adjust and wind up its business and affairs, and may sue and be sued in its corporate name. Any assets remaining after all liabilities or obligations of the corporation have been satisfied or discharged shall be ratably distributed to the members thereof.

§ 5483. Amendment of certificate of incorporation.

A corporation created hereunder may amend its certificate of incorporation to change its corporate name, to increase or reduce the number of its directors or change any other provisions therein; provided, however, that no corporation shall amend its certificate of incorporation to embody therein any purpose, power or provision which would not be authorized if its original certificate including

such additional or changed purpose, power or provision were offered for filing at the time a certificate under this section is offered. Such amendment may be accomplished by filing a certificate which shall be entitled and indorsed "certificate of amendment of certificate of incorporation of ..... electric power association," and state:

(1) The name of the corporation, and if it has been changed the name under which it was originally incorporated.

(2) The date of filing the certificate of incorporation in each public office where filed.

(3) The purposes, powers or provisions, if any, to be amended or eliminated and the purposes, powers, or provisions, if any, to be added or substituted. Such certificate shall be subscribed in the same manner as a original certificate of incorporation hereunder by the president or a vice-president and by the secretary or an assistant secretary who shall make [and] annex an affidavit stating that they have been authorized to execute and file such certificate by the votes cast in person or by mail by a majority of the members of the corporation entitled to vote. Such certificate shall be filed in the same places and approved by the same officers as an original certificate of incorporation and thereupon the amendment shall be deemed to have been effected.

§ 5484. Moneys of corporations.

All moneys of a corporation from whatever source derived, shall be deposited in one or more banks or trust companies, and, if the corporation shall so require, each of such accounts shall be continuously secured by a pledge of direct obligations of the United States of America or of the State of Mississippi having an aggregate market value,

exclusive of accrued interest, at all times at least equal to the balance on deposit in such account or accounts.

Such securities shall either be deposited with the corporation or held by a trustee or agent satisfactory to the corporation. In lieu of any such pledge or such securities, said deposits may be secured by a surety bond or bonds which shall be in form, sufficiency and substance satisfactory to the corporation.

§ 5485. Chartering existing corporations under this Act.

Any existing corporations under the laws of the State of Mississippi organized for the same general purposes as the corporations provided for by this Act may be chartered hereunder by filing with the Secretary of State a certificate, approved by a majority of the board of the corporation, signed by the duly authorized officer or officers thereof, and acknowledged by the subscribers before any officer authorized to take acknowledgments to deeds or other instruments. Such certificate shall set forth the information required under Section 4 hereof [§ 5466, supra] for corporations organizing under this Act, shall declare the intention of the corporation to operate under this Act, and shall be filed in the office of the Secretary of State, who shall forthwith cause this certificate to be handled in the manner prescribed in Section 6 hereof [§ 5468, supra] for original certificates of incorporation. The corporation under its existing name shall thereupon have all powers and duties set forth in this Act, but shall relinquish the powers under its former charter; and no debt or other obligation, of or to the corporation, incurred prior to reincorporation under this section, shall be affected thereby. Any act, contract, or covenant heretofore done, made, entered into or performed by any corporation organized under any other Act but reincorporating hereunder, is hereby ex-

pressly validated if such act, contract, or covenant would have been valid if done, made, entered into or performed under the terms hereof.

§ 5486. Taxation of corporations.

All corporations and their property shall be liable for taxes and taxed and assessed in the same manner and to the same extent as privately owned utilities.

§ 5487. Construction of Act.

This Act is to be liberally construed and the enumeration of any object, power, manner, method or thing shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods or things.

§ 5488. Separability of provisions.

If any provision of this Act, or the application of such provision to any person, body, or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons, bodies, or circumstances, other than those as to which it shall have been held invalid, shall not be affected thereby.

§ 5489. Act complete in itself.

This Act is complete in itself and shall be controlling. The provisions of any other law, general, special or local, except as provided in this Act, shall not limit or restrict the powers of any corporation formed under this Act.

APPENDIX 2

Sections 26 and 27, Chapter 372, Mississippi Laws of 1956 (Sections 7716-26 and 7716-27, Volume 6, Recompiled, Mississippi Code of 1942)

§ 7716-26. Review.

(a) In addition to other remedies now available at law or in equity any party aggrieved by any final finding, order, or judgment of the commission, shall have the right, regardless of the amount involved, of appeal to the Chancery Court, First Judicial District of Hinds County, Mississippi. If an application for rehearing has been filed, an appeal must be filed within thirty (30) days after the application for rehearing has been refused or deemed refused because of the commission's failure to act thereon within the time specified in the preceding section or, if the application is granted, within thirty (30) days after the rendition of the decision on rehearing. If an application for rehearing has not been filed, an appeal must be filed within thirty (30) days after the entry of the commission's order. Every appeal shall state briefly the nature of the proceedings before the commission, and shall specify the order complained of. Any person whose rights may be directly affected by said appeal may appear and become a party, or the court may upon proper notice order any person to be joined as a party.

(b) Upon the filing of an appeal the clerk of the chancery court shall serve notice thereof upon the commission, whereupon the commission shall, within sixty (60) days (or within such additional time as the court may for cause allow) from the service of such notice, certify to the chancery court the record in the case, which record shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders,

findings and opinions entered in the case; provided however, that the parties and the commission may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

(c) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record and evidence transferred.

(d) The court may hear and dispose of the appeal in term time or vacation and the court may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may be; but in case the order is wholly or partly vacated the court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the court's order as, in the opinion of the court, justice may require. The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.

§ 7716-27. Stay of orders.

The pendency of proceedings to review shall not of itself stay or suspend the operation of the order of the commission, except in the case of a rate order where the utility has put rates into effect under bond as provided in section 10 [§ 7716-10]. However, any party may, as a matter of right, secure from the court in which a review of or appeal from the order of the commission is sought an order suspending or staying the operation of the order of the commission pending a review of such order, by adequately securing the other parties against loss due to the delay in the enforcement of the order in case the order

under review is affirmed, the security to be in such form and amount as shall be directed by the court granting the stay or suspension.

If an appeal be taken from an order of the commission reducing existing rates or refusing to approve rates proposed by a utility, the court, in suspending the order of the commission, shall permit the utility to continue the existing rates in effect or to place the proposed rates in effect, pending final determination of the appeal, upon filing with the court a bond in a reasonable amount approved by the court, with sureties approved by the court, conditioned upon the refund, with lawful interest, to the parties entitled thereto, of the amount of the excess if the existing rate or rates or the rate or rates so put into effect are finally determined to be excessive; or the court may, if a utility has put rates into effect under bond as provided in section 10 [§ 7716-10] of the act, require the utility to file a bond conditioned as herein provided for such additional amount as the court deems proper.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 597

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, ET AL.,
Respondents.

BRIEF OF RESPONDENTS: SINGING RIVER ELECTRIC POWER ASSOCIATION; PEARL RIVER VALLEY ELECTRIC POWER ASSOCIATION; DIXIE ELECTRIC POWER ASSOCIATION; SOUTHERN PINE ELECTRIC POWER ASSOCIATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

DONALD WADSWORTH WILLIAMSON, JR.
HEDGEPETH AND HEDGEPETH
Deposit Guaranty Bank Building
Jackson, Mississippi
Attorney for Respondents

Of Counsel:
JOHN K. KEYES
Collins, Mississippi

E. L. MENDENHALL, INC., 916 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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Now come the respondents, Singing River Electric Power Association, Pearl River Valley Electric Power As-

sociation, Dixie Electric Power Association and Southern Pine Electric Power Association, and respectfully suggest unto the Court that they have carefully examined the brief filed or to be filed herein by the respondent South Mississippi Electric Power Association. These respondents do hereby advise the Court that they concur in the aforesaid brief, and they respectfully suggest unto the Court that the matters contained in said brief are well taken.

These respondents hereby adopt the aforesaid brief of South Mississippi Electric Power Association, and request the Court that said brief be taken and considered as the brief of these respondents.

Respectfully submitted,

Donald Wadsworth Williamson Jr.

DONALD WADSWORTH WILLIAMSON, JR.
HEDGEPETH AND HEDGEPETH
Deposit Guaranty Bank Building
Jackson, Mississippi
Attorney for Respondents

Of Counsel:
JOHN K. KEYES
Collins, Mississippi

CERTIFICATE OF SERVICE

I, Donald Wadsworth Williamson, Jr., attorney of record for Singing River Electric Power Association, Pearl River Valley Electric Power Association, Dixie Electric Power Association and Southern Pine Electric Power Association, respondents in the above styled cause, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served a copy of the foregoing brief upon petitioners and other interested persons in the following manner: By depositing copies thereof in sealed envelopes in the United States Post Office, Jackson, Mississippi, with first class postage prepaid, properly addressed, to each of the attorneys of record for petitioners and other interested persons, to-wit: James S. Eaton, Esquire, 2300 Fourteenth Street, Gulfport, Mississippi, and Thomas H. Watkins, Esquire, Plaza Building, Jackson, Mississippi, attorneys of record for Mississippi Power Company; Sherwood W. Wise, Esquire, Electric Building, Jackson, Mississippi, attorney of record for Mississippi Power & Light Company; T. Harvey Hedgepeth, Esquire, Deposit Guaranty Bank Building, Jackson, Mississippi, attorney of record for the respondent South Mississippi Electric Power Association; and Bennett E. Smith, Esquire, Assistant Attorney General of the State of Mississippi, State Office Building, Jackson, Mississippi, attorney of record for Mississippi Public Service Commission.

This Oct 30, 1968.

Donald Wadsworth Williamson

DONALD WADSWORTH WILLIAMSON, JR.

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 597

MISSISSIPPI POWER COMPANY, ET AL.,
Petitioners,

vs.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, ET AL.,
Respondents.

SUPPLEMENT TO BRIEF OF RESPONDENT SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI
Containing
SUMMARY OF ARGUMENT PURSUANT TO RULE 40-1-(f)

(This summary appears in this supplement because it was not detected that the argument would exceed twenty pages until the printed brief was received from the printer)

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Two Theories of Case

Respondent's theory of the case presented by its petition to amend its certificate of March 7, 1963, which theory

was shared by the Commission and the State Supreme Court was that the petition sought authority to make modifications, and additions to the generating and transmission facilities previously authorized in order to handle the increase in loads due to normal load growth occurring during the time that construction was prevented by litigation and a stay order. Petitioners' theory was that since actual construction had not been commenced (regardless of the cause of delay) the Commission could not by certificate amendment authorize increased capacity to meet load growth but Respondent would be held to have abandoned its certificated system and would be required to prove all over again that public convenience and necessity required that it enter the field of generation and transmission with any facilities at all.

Exclusion of Evidence Offered by Petitioners (As Protestants)

All evidence offered by petitioners and excluded was on the question of whether public convenience and necessity required that respondent enter the field of generation and transmission with any facilities at all, a question previously determined by the Commission and the Courts on the original application. Petitioners offered no evidence on the question of whether it would be more economical and efficient and in the public interest for respondent to be authorized to provide increased system capacity as initial construction rather than building the system as originally ~~constructed~~ certificated and making additions.

Cross-Examination

The only denial of cross-examination was on the issue of whether respondent should be permitted to build any facilities at all, falling in precisely the same category as the excluded evidence referred to above.

Usages in Public Utility Regulation

There is a necessary usage in public utility regulation throughout the country which permits and often requires in the public interest that Certificates of Public Convenience and Necessity be amended before or during construction of facilities authorized under them in order to meet changing needs and requirements; and this is especially true in the electrical utility field.

Fourteenth Amendment Requirements

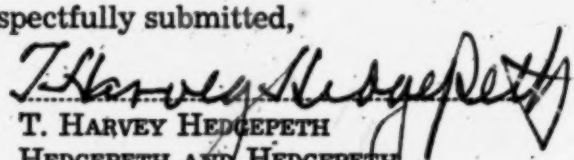
Neither the due process nor equal protection clauses of the Fourteenth Amendment to the Federal Constitution requires any Commission or Court to receive irrelevant evidence. The right to produce evidence of which a person may not be deprived is the right to present relevant evidence.

Petitioners' Arguments and Authorities

Respondent readily agrees that the Fourteenth Amendment requires a full and fair hearing with equal opportunity for all parties to present evidence and cross-examine witnesses. But this relates to relevant evidence. None of the excluded evidence was relevant to any issue presented by the petition to amend; nor were the points on which cross-examination was denied relevant to any such issue. Both related to an issue which had been previously determined on the original application and settled beyond any right of

appeal. Therefore, none of petitioners' authorities are in point.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, T. Harvey Hedgepeth, one of the attorneys of record for South Mississippi Electric Power Association, a Respondent in the above-styled cause, and a member of the Bar of the Supreme Court of the United States, certify that I have this day served the foregoing supplement to brief upon Petitioners and other interested persons in the following manner: by depositing copies thereof in sealed envelopes in the United States Post Office at Jackson, Mississippi, first class postage prepaid, properly addressed to each of the attorneys of record of such parties and other interested persons, to-wit: James S. Eaton, Esquire, 2300 Fourteenth Street, Gulfport, Mississippi, Attorney for Petitioner Mississippi Power Company; Thomas H. Watkins, Esquire, Plaza Building, Jackson, Mississippi, Attorney for Petitioner Mississippi Power Company; Sherwood W. Wise, Esquire, Electric Building, Jackson, Mississippi, Attorney for Petitioner Mississippi Power & Light Company; John K. Keyes, Esquire, Collins, Mississippi, Attorney in the court below, and Donald Wadsworth Williamson, Jr., Esquire, Deposit

Guaranty Bank Building, Jackson, Mississippi, Attorney of Record in this Court for Singing River Electric Power Association, Dixie Electric Power Association, Southern Pine Electric Association, and Pearl River Valley Electric Power Association, Respondents, herein; and Bennett E. Smith, Esquire, Assistant Attorney General of the State of Mississippi, State Office Building, Jackson, Mississippi, Attorney for Mississippi Public Service Commission.

This Nov. 1, 1968.

T. Harvey Hedgepeth

T. HARVEY HEDGEPETH